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SERVICE OF THE PEOPLE IS THE SUPREME LAW

SATYAMEVA JAYATE

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BANGALORE UNIVERSITY LAW JOURNAL

University Law College & Department of Studies in Law
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EDITORIAL NOTE

It is indeed a momentous occasion for Bangalore University in general and University Law College in particular to bring out a Law Journal after completion of more than 50 years of its existence under the auspices of Bangalore University. The editors wish to place on record and thank V. B. Coutinho Trust ® for being kind and gracious to hand over the future publications of Bangalore Law Journal (BLJ) to the Principal, University Law College, to be published as "Bangalore University Law Journal" (BULJ). We also thank the Hon'ble Vice-Chancellor, Registrar and Finance Officer, Bangalore University, Bangalore for having accepted our proposal for the journal and sanctioning requisite funds for printing of the journal.

Research is an important aspect of the academic life of a teacher. The ever changing socio-legal dynamics present an opportunity to all the teachers to undertake research by writing scholarly articles on several issues and thereby contribute in furthering knowledge and promote future research.

It has been a long standing desire of the faculty of University Law College & Department of Studies and Research in Law, Bangalore University to have a journal of its own and we are happy that it is fulfilled with the blessings of Jurists, Senior Professors and Former Principals of University Law College, Bangalore University, Bengaluru.

The BULJ will be a peer reviewed journal inviting scholarly articles from faculty and scholars across the country. We hope the inaugural issue of BULJ would benefit the readers.

Prof. Dr. V. Sudesh
Principal,
University Law College
Bangalore University, Bangalore

CONTENTS

IS SEXUAL HARASSMENT IN HIGHER EDUCATION INSTITUTIONS A MYTH OR REALITY? : A LEGAL STUDY

Prof. (Dr.) T.R.Subramanya *
Aruna L **

Introduction

While documentaries and allegations of students being sexually abused also raped in a few cases in the college campus is very frequently seen and read about, the reports furnished by the universities with regard to the occurrences of sexual harassment is very minimal. For instance, in the documentary 'The Hunting Ground'[1] several students from across various prestigious universities like Harvard Law School, Yale University, Stanford University, *etc.,* complained that they were sexually abused and when they did complain, they were questioned about their integrity and a negligible number of cases actually resulted in expulsion or action against the perpetrator. Students in the United States can also use the provisions against sexual harassment under Title IX of the Educational Amendments Act, 1972[2] , which was enacted to specifically protect students since Title VII of the Civil Rights Act, 1964[3] provide to protect only employees. *Alexander v Yale University's case*[4] which is one of the first cases of its kind where women and men, including students and faculty, gave a high sign about the incidence of sexual harassment in the campus and persisted on immediately attention and action of the college authorities to take appropriate action.[5] Being the pioneers, they

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1 *The Hunting Ground is a 2015 documentary film about the incidence of sexual assault on college campuses in the United States and what its creators say is a failure of college administrations to deal with it adequately. Video available at The Hunting Ground (2015), http://thehuntinggroundfilm.com/ (last visited Dec 23,2019)*

2 *Title IX of the Education Amendments of 1972, 20 U.S.C. A§ 1681 ET. SEQ. The main object of Title IX is that 'No person in the United States of America shall, on the basis of sex, be excluded from participation in, be denied the benefit of, or be subjected to discrimination under any education programme or activity receiving Federal financial assistance.'*

3 *Title VII prohibits employment discrimination based on race, color, religion, sex and national origin.*

4 *Alexander v. Yale, 631 F.2d 178 (2d Cir. 1980)*

5 *Elaine D. Ingulli, "Sexual Harassment in Education" 18 RUTGERS L.J. 281 - 342 (1987)*

did not get the desired result or any remedy, but they sure made an impression and Yale University set up an Anti - Sexual Harassment committee within its campus.

The Role of Educators

The *in loco parentis* principle make it obligatory on educators to step into the shoes of the parents since the educators are the protectors in the campus. Due to the vulnerability of students and the higher and influential position of the educator, very often, instead of acting as the guardian of the student, they become predatory.[6] What makes campus sexual offences by faculty different from sexual harassment at the workplace is that the availability of fresh victims and the opportunity to commit the same crime multiple times.[7] The reason is that students who are in higher educational institutions are time-bound. They will be in the campus either for 2, 3 or 5 years, depending on their academic course. The faculty perpetrator also holds a very influential position in terms of grades and promotion. Also, students, particularly women, are prone to peer sexual harassment, which is sexual harassment by other students who may be their classmates or seniors in college.[8]

In India, education in the ancient times was through the medium of in-house imparting of knowledge by the Gurus to their Shishyas by accommodating them in the Guru's place of residence. The 'Guru- Shishya parampara' is something which we consider a very prestigious part of the Indian Culture. However, in the present times, this pride is being ripped off by the acts of a few teachers who do not maintain the professional standards and allow their personal lust to take priority over their duties. The UGC (Prevention, Prohibition & Redressal of Sexual Harassment of Women Employees and students in higher education institutions) Regulations, 2015 is a right move taken in order to address this issue. What, however, seems elusive is its effectiveness in terms of its application and accountability.

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[6] *D. Smit; V. du Plessis, "Sexual Harassment in the Education Sector," 14 POTCHEFSTROOM ELEC. L.J. 172, 217 (2011)*

[7] *Nancy Chi Cantalupo; William C. Kidder, "A Systematic Look at a Serial Problem: Sexual Harassment of Students by University Faculty" UTAH L. REV. 671 (2018).*

[8] *Caroline Vaile Wright & Louise F. Fitzgerald, "Angry and Afraid: Women's Appraisal of Sexual Harassment During Litigation" 31 PSYCHOL. WOMEN Q. 73, 75 (2007)*

Sexual Harassment: Reality Versus Reports

Articles 2[9], 3[10], 19[11] and 29[12] of the UN Convention on the Rights of the Child, 1992[13] lay down the general requirements, whereas Article 34[14] specifically lays down that every child (below the age of 18 years of age) shall be protected against sexual harassment. HeForShe[15], U.N. Women's "solidarity movement for gender equality," published a report[16] wherein students and faculty from 10 universities across five continents were approached to understand the occurrence of sexual harassment in the campus and the likelihood of reporting it.[17] Alongside Emma Watson[18], the UN goodwill ambassador, while speaking on "HeForShe" pointed out that

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[9] *Article 2: It is the duty of the state (each country) to uphold the articles in the convention and apply it to all children regardless of the child's or the family's race, color, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status. The state should protect the child against all forms of discrimination.*

[10] *Article 3: the state will always act in the best interest of the child while taking into consideration the rights and duties of the guardians. The state shall ensure all institutions government or not adhere to this dictum.*

[11] *Article 19 reads as - The state shall take all types of actions to protect the child from any form of abuse, exploitation or neglect. The state shall create system to ensure the child receives all needed support in form of prevention, protection and rehabilitation.*

[12] *Article 29: Child education should be geared towards the complete development of the child, in accordance with the child's cultural identity and human rights treaties, and to prepare the child for responsible life in society. It should not be detrimental to the environment. People may be allowed to establish educational institutes in accordance with these standards.*

[13] *Ratified by 192 countries including India, this /convention is the most ratified of all International Human Rights Treaties. It has 54 Articles on the whole.*

[14] *Article 34: Every child has the right to be protected from sexual exploitation and sexual abuse. The state must hence prevent the coercion and prostitution of children for such activities as well as safeguard children from pornographic performances and materials.*

[15] *A UN initiative launched on September 20th, 2014, where men and boys are engaged as agents of change for the achievement of gender equality*

[16] *The IMPACT 10x10x10, Gender Parity Report 20178–13 (2019).*

[17] *Women's safety at university, Sexual Harassment of Women and Girls in Public places – Women and Equalities Committee- House of Commons (2018)*

[18] *Emma Watson is most popular for playing the character of Hermione Granger, one of Harry Potter's closest companions in the 'Harry Potter' film franchise. She moved on from Brown University in Providence, Rhode Island in 2014 with an English degree. That very year, she was delegated an UN Women Goodwill Ambassador.*

students both male and female are equally vulnerable to sexual harassment in the campus not only by faculty or other staff but also from students both senior and junior to them.[19] In India, school-going children are protected under the Protection of Children from Sexual Offences (POCSO) Act, 2012, irrespective of which gender they belong to, female students above the age of 18 are provided protection under the UGC Regulations of 2015, but male students are not provided equal protection against sexual offences within the campus.

In June 1989, Catherine A. MacKinnon[20] in her graduation address,[21] said that women whether they adorn the role of a student, lawyer or any other professional is vulnerable to sexual harassment and she resounded that she was a victim and most women are. In her inspirational speech, she encouraged all her fellow women law graduates to take the problem of sexual harassment very seriously and to help millions of women who were waiting for help, since they were equipped with a very unique tool, which is the 'knowledge of law'.

The National Institute of Justice[22] was required to provide a report for which it was commissioned and it gave a staggering figure that 19% women and 2.5% men were sexually harassed in their college, which was further substantiated by the American Association of Universities (AAU) in its 2015[23] survey that 26.1% women undergraduates were harassed. The victims

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[19] *United Nations, YOUTUBE (2014), https://www.youtube.com/watch?v=gkjW9PZBRfk (last visited Jul 4, 2019).*

[20] *Catharine A. MacKinnon is a legal counselor, educator, author, and activist on sexual equality issues locally and globally. She is Elizabeth A. Long Professor of Law at the University of Michigan and from 2008-2012 was the main Special Gender Adviser to the Prosecutor of the International Criminal Court. She has been the James Barr Ames Visiting Professor of Law at Harvard Law School since 2009. Broadly distributed in numerous dialects, her dozen books incorporate Sexual Harassment of Working Women (1979), Feminism Unmodified (1987), Toward a Feminist Theory of the State (1989), Only Words (1993), Women's Lives, Men's Laws (2005), Are Women Human? (2006), her casebook Sex Equality (2016), and Butterfly Politics (2017)*

[21] *Catharine A. MacKinnon, "Graduation Address: Yale Law School, June 1989" 2 Yale J.L. & Feminism 299 (1990)*

[22] *Christopher P. Krebs, Christine H. Lindquist,et.al., "The Campus Sexual Assault (CSA) Study" 5-27 (2007)*

[23] *Report on the AAU Climate Survey on Sexual Assault and Sexual Misconduct, WESTAT (2015)*

show symptoms of emotional and physical trauma, which directly impacts their educational performance.[24] This is further compounded by the societal attitude which is viewed from a total disregard of the victim's intellectual development and public life.[25]

In the United Kingdom, an overview with a sample size of 4,491 students across 153 higher educational institutions through online media and messages uncovered that half of them who graduated experienced sexual harassment. Out of which 57% were women and 19% men, yet just only 6% decided to report the incident to the authorities. What is alarming is the way that 35% felt too embarrassed and 29% didn't have the foggiest idea how to submit a report or whom to approach.

Can Men be Victims of Sexual Harassment?

In 1981, United States Merit Systems Protection Board (USMSPB) reported that 22% of the male targets identified men as perpetrators, compared to 72% who reported women as perpetrators (the remaining 6% identified both men and women as perpetrators).[26] In the report distributed in 2007 by the Ministry of Women and Child Welfare of India, which led a survey supported by United Nations Children's Fund and Prayas[27] to comprehend the gravity of Child sexual harassment in India, a surprising 52.94% of boys revealed sexual harassment and 21% announced serious types of sexual abuse where the victims were made to show their genitals, some photographed them, some required the victim to stroke the private parts of the culprit and so on. Out of 12,447 child respondents, about 53.22% of kids have been accounted for to have been victimized to at any rate one sort of sexual abuse and a pre-dominant part were boys. A state-wise breakdown shows that 9 out of 13 (69%) states announced a higher level of sexual abuse among boys when contrasted with girls, with Delhi detailing a figure of 65.64%.

These figures apart, once the boys attain majority; they are abandoned by the law from protection against sexual offences and not only that, the law

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[24] *Catharine A. MacKinnon, In Their Hands: Restoring Institutional Liability for Sexual Harassment in Education, 125 YALE L. J. 2038, 2105 (2016).*

[25] *Phyllis L. Crocker; Anne E. Simon, "Sexual Harassment in Education" 10 CAP. U. L. REV. 541, 584 (1981).*

[26] *Records of the Merit Systems Protection Board [MSPB] https://www.archives.gov/research/guide-fed-records/groups/479.html (last visited on Sep 18, 2019)*

[27] *PRAYAS (Initiatives in Health, Energy, Learning and Parenthood) is a non-governmental, non-profit organization based in Pune, India.*

also presumes that they are the only possible perpetrators, especially in graver forms of sexual offences like rape. There is absolutely no skepticism about the fact that women are more vulnerable as victims of sexual offences not only because of their physical or biological stature but also because of the impact of our society being more patriarchal. But with figures showing that boys are equally vulnerable as students or rather more prone to being abused in some states, the availability of no protection for them neither under the civil statutes nor under the penal provisions is a question which viewed from any angle fails to give a comprehendible answer.

Safety in the Higher Educational Institutional Campuses in India

In the light of the Nirbhaya Rape case, Justice Verma Committee[28] was appointed to assess the need for an amendment to the Criminal laws and hence the Criminal Law (Amendment) Act, 2013 was passed and as a result, amendments to a few sections in the Indian Penal Code, Criminal Procedure Code and the Indian Evidence Act was brought about. Section 354A, 354B, 354C and 354D were added to IPC and the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 (hereinafter referred to as the Act) was also passed as a means to give a regulatory framework to the guidelines laid down by the Hon'ble Supreme Court of India in Vishaka's case.[29] Section 2(n)[30] of the Act defines Sexual harassment. In furtherance to this, The University Grants Commission (UGC)[31] promulgated the UGC (Prevention, Prohibition & Redressal of Sexual Harassment of Women Employees and students in higher education institutions) Regulations, 2015[32] hereinafter referred to as the 'Regulations' as an outcome of the

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[28] *JS Verma Committee Report, http://www.prsindia.org/uploads/media/Justice%20verma%20committee/js%20verma%20committe%20report.pdf (last visited on Jan 12, 2020)*

[29] *Vishaka v State of Rajasthan (1997) 6 SCC 241*

[30] *Section 2 (n) "sexual harassment" includes any one or more of the following unwelcome acts or behavior (whether directly or by implication) namely:*
(i) physical contact and advances; or
(ii) a demand or request for sexual favors; or
(iii) making sexually colored remarks; or
(iv) showing pornography; or
(v) any other unwelcome physical, verbal or non-verbal conduct of sexual nature;

[31] *A statutory body set up to coordinate, determine and maintain standards of higher education in India under the UGC Act 1956*

[32] *University Grants Commission (Prevention, Prohibition & Redressal of Sexual Harassment of Women employees and students in higher education institutions) Regulations, 2015, (2016),*

SAKSHAM report[33] wherein UGC set up a task force to explore the then situation in Higher Educational Institutions (HEIs). In fact, the definition in the Regulations is broader than the benchmark laid down under the Act. Under Section 2 (k)[34] sexual harassment has been defined and the Regulations extend to all Women in Higher Education Institutions (HEIs), which includes students as well. UGC then made it mandatory under Sec 3 (1) (a),[35] for all HEIs to subsume it in a policy or regulation as the HEI may deem fit to prevent and prohibit sexual harassment against the women employees and students.

Protective and Proactive Campuses

The pioneer on acting against inappropriate behavior in the campuses is the Delhi University, which through its Ordinance 'Prohibition of and

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https://www.ugc.ac.in/pdfnews/7203627_UGC_regulations-harassment.pdf (last visited Jun 14, 2019).

[33] *Measures for Ensuring the Safety of Women and Programmes for Gender Sensitization on Campuses, SAKSHAM (2013), https://www.ugc.ac.in/pdfnews/5873997_SAKSHAM-BOOK.pdf (last visited Jun 13, 2019).*

[34] *Section 2(k) "sexual harassment" means-*

(i) "An unwanted conduct with sexual undertones if it occurs or which is persistent and which demeans, humiliates or creates a hostile and intimidating environment or is calculated to induce submission by actual or threatened adverse consequences and includes any one or more or all of the following unwelcome acts or behavior (whether directly or by implication), namely;-
(a) any unwelcome physical, verbal or nonverbal conduct of sexual nature;
(b) demand or request for sexual favors;
(c) making sexually colored remarks
(d) physical contact and advances; or (e) showing pornography"

(ii) any one (or more than one or all) of the following circumstances, if it occurs or is present in relation or connected with any behavior that has explicit or implicit sexual undertones- (a) implied or explicit promise of preferential treatment as quid pro quo for sexual favors; (b) implied or explicit threat of detrimental treatment in the conduct of work; (c) implied or explicit threat about the present or future status of the person concerned; (d) creating an intimidating offensive or hostile learning environment; (e) humiliating treatment likely to affect the health, safety dignity or physical integrity of the person concerned;

[35] *Regulation 3 (1)(a) Wherever required, appropriately subsume the spirit of the above definitions in its policy and regulations on prevention and prohibition of sexual harassment against the employees and the students, and modify its ordinances and rules in consonance with the requirements of the Regulations.*

Punishment For Sexual Harassment: Ordinance XV (D)'[36] passed in 2003 set a model by making an unbiased arrangement which gives assurance against any type of sexual harassment in the campus to every one of its employees and students independent of their sex. In the year 1995-96, few teachers and students circulated questionnaires to survey the occurrence of sexual harassment in colleges which was exhibited by the consequences of the investigation. This, at that point, took the framework of the Ordinance, which is extensively drafted.

While examining the approaches of a couple of top Law schools in India, it is observed that the top law school, National Law School of India University (NLSIU), has an unbiased policy against sexual harassment in the campus. While the National Academy of Legal Studies and Research (NALSAR) has decided to embrace the 2013 enactment on the security of Women at the work environment, the West Bengal National University of Juridical Sciences (WBNUJS) has an extensively gender-neutral approach which has an illustrative definition of sexual harassment and covers a wide range of harassment. The Christ University Policy is gender-neutral yet follows a similar meaning of sexual harassment and working environment as characterized in the 2013 Act. In Bangalore University, sexual harassment is contained through its Equal Opportunity Cell, which along with protection of students from being discriminated in any form, also addresses sexual harassment and the regulations are an adaptation of the UGC Regulations. This ought to be considered as an extremely welcome move since these colleges have had the option to acclimatize that inappropriate behavior in the campuses, which can be construed as sexual harassment, is an evil which must be tended to and furthermore that they are making strides not simply to moderate it from a legal benchmark point of view however are truly proceeding to guarantee they give a safe, educational environment to support their students to make them future achievers.

The Present Study

The present study is based on qualitative and quantitative analysis of data collected from 377 students across 2 Universities in Bangalore, one being Bangalore University, which is one of the biggest Public Universities in Bangalore and the other CMR University, which is a private University based in Bangalore. The respondents have been chosen on a random basis and were

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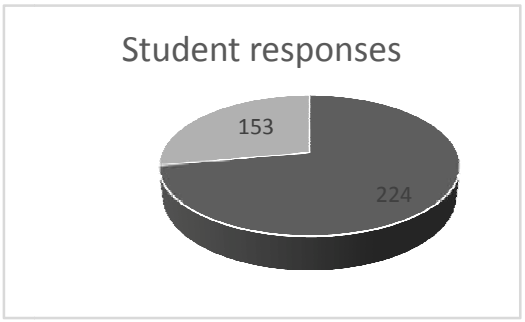
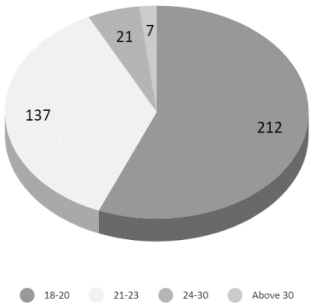
[36] *Prohibition of and Punishment For Sexual Harassment: Ordinance XV (D), http://www.dr.du.ac.in/files/ordxvd.pdf (last visited on Oct 2, 2020)*

administered the questionnaire through electronic means. Due to the sensitivity of the issue, only gender and age have been collected as demographic data and hence these are the independent variable in the study. The questionnaire had 13 close-ended questions. Respondents had to choose only one option for question numbers 1-6 and 9-11, while question numbers 7,8,12 and 13 had multiple options and respondents could choose more than one option. The results of the study is graphically represented as follows:

Pic 1 – Shows the number of student responses.
224 Female and 153 male responses were received



Pic : 2 Depicts the age (in years) range of the students who have responded to the questionnaire given to them



Pic: 1 Depicts the age (in years) range of the students who have responded to the questionnaire given to them

Table 1: Association between the age of the participant and having heard of sexual harassment

Age (years)	*Heard about sexual harassment*			*Total*	*p-value*
	Never	*Often*	*Rarely*		
18-20	97	41	74	212	
	45.8%	19.3%	34.9%	100.0%	
21-23	33	32	72	137	

	24.1%	23.4%	52.6%	100.0%	
24- 30	7	2	12	21	<0.0001
	33.3%	9.5%	57.1%	100.0%	
Above 30	0	4	3	7	
	.0%	57.1%	42.9%	100.0%	
Total	137	79	161	377	
	36.3%	21.0%	42.7%	100.0%	

The above table shows the association between the age of the participant and ever having heard of sexual harassment. Less than a quarter of all participants between the ages of 18 to 30 had heard of sexual harassment 'often.' This could indicate both a reduced prevalence as well as under reporting given the various social ramifications that surround cases of this nature. However, among those above 30 years of age (although the number of participants was least in this age group), more than half (57.1%) had heard of it 'often.' Incidentally, the highest percentage of participants overall (42.7%) had 'rarely' heard of sexual harassment. This could be interpreted as that they are too conservative to disclose or can be because they do not feel an act of sexual harassment, grave enough for reporting. The association between age and having heard about sexual harassment was statistically significant at $p<0.0001$.

Table 2: Association between the age of the participant and having knowledge about the existence of an Internal Complaints Committee (ICC) in their Higher Educational Institution.

Count % within Age		*Knowledge about their Institution having an ICC*				*p-value*
		Don't know	*No*	*Yes*	*Total*	
Age (years)	18-20	116	27	69	212	<0.0001
		54.7%	12.7%	32.5%	100.0%	
	21-23	50	41	46	137	
		36.5%	29.9%	33.6%	100.0%	
	24- 30	12	5	4	21	
		57.1%	23.8%	19.0%	100.0%	
	Above 30	1	0	6	7	
		14.3%	.0%	85.7%	100.0%	
Total		179	73	125	377	

Count % within Age		*Knowledge about their Institution having an ICC*				*p-value*
		Don't know	*No*	*Yes*	*Total*	
Age (years)	18-20	116	27	69	212	<0.0001
		54.7%	12.7%	32.5%	100.0%	
	21-23	50	41	46	137	
		36.5%	29.9%	33.6%	100.0%	
	24- 30	12	5	4	21	
		57.1%	23.8%	19.0%	100.0%	
	Above 30	1	0	6	7	
		14.3%	.0%	85.7%	100.0%	
Total		179	73	125	377	
		47.5%	19.4%	33.2%	100.0%	

The above table shows the association between the age of the participant and having heard about the sexual harassment committee, which is called as Internal Complaints Committee (ICC). Less than 13% of all participants between the ages of 18 to 30 years had not heard of the ICC on their campus, whereas more than half of them were not aware about its existence. This could indicate a nil sensitization program conducted by the Institution, which is a mandatory requirement under Regulation 3 (1) (b),[37] (c),[38] (g)[39] and (i)[40] of the Regulations. However, among those above 30 years of age (although the number of participants was least in this age group), a substantial number of students (83.8%) had heard of it. The association between age and having heard about ICC to redress sexual harassment was statistically significant at $p<0.0001$.

[37] *(b) publicly notify the provisions against sexual harassment and ensure their wide dissemination*

[38] *(c) organize training programs or as the case may be, workshops for the officers, functionaries, faculty and students, as indicated in the SAKSHAM Report (Measures for Ensuring the Safety of Women and Programmed for Gender Sensitization on Campuses) of the Commission, to sensitize them and ensure knowledge and awareness of the rights, entitlements and responsibilities enshrined in the Act and under these regulations;*

[39] *(g) create awareness about what constitutes sexual harassment including hostile environment harassment and quid pro quo harassment*

[40] *(i) inform employees and students of the recourse available to them if they are victims of sexual harassment;*

Table 3: The association between gender and their opinion as to who can be victims of sexual harassment in the campus.

Gender	*Who could be victims of sexual harassment*				*Total*	*p-value*
	Outsiders visiting the college	*Random trespassers*	*Students*	*All of the above*		
Female	0	0	11	213	224	0.006
			4.9%	95.1%	100.0%	
Male	1.7%	3	16	133	153	
		2.0%	10.5%	86.9%	100.0%	
	1.3%	3	27	346	377 (100%)	
		.8%	7.2%	91.8%		

The above table depicts the association between gender and the opinion regarding who could be subject to sexual harassment. The majority of student participants, including 86.9% male and 95.1% female students, stated that all persons were vulnerable to being victims of sexual harassment in the campus irrespective of whether they were students of the college or participants who would come to be a part of various campus events. Less than a fifth of the participants of both genders believed students could also be perpetrators. Our finding was statistically significant at p=0.006.

Table 4: The association between gender and participants' perception about whether everyone should be afforded protection against sexual harassment in the campus, irrespective of their sex.

Count *% within Gender*	*All to be Protected On Campus*			*Total*	*p-value*
	Maybe	*No*	*Yes*		
Female	3	4	217	224	0.02
	1.3%	1.8%	96.9%	100.0%	
Male	10	3	140	153	
	6.5%	2.0%	91.5%	100.0%	
Total	13	7	357	377	
	3.4%	1.9%	94.7%	100.0%	

The above table depicts the perception of students about the Act and its application. An overwhelming number of students, female (96.9%) and male (91.5%) have felt that the Act should be gender-neutral so as to provide equal protection to both sexes against sexual harassment. Our findings were also statistically significant at p=0.02. The students who have responded with a 'May be' indicate that they do not oppose the idea but are unsure which may be due to the fact that they have not heard of sexual harassment against men in the campuses or because they feel that women are more vulnerable as victims. However, reading in line with the previous finding, it may also be taken to indicate that they do not at this point in time moot the change in the law. But this being a very small percentage of about 25 respondents out of the total 377 is miniscule.

The Menace of Under Reporting

The above instances and discussions have very clearly indicated that sexual harassment is a growing menace in the higher education institutions and that irrespective of the sex of the victim, any person can be a victim to an offence of sexual harassment which may range from a minor to a serious one in terms of its gravity. What is also obvious is that the impact it leaves on the victim both physiologically and psychologically will be engraved in the young minds for a very long time and this needs immediate attention. However, a glaring defect in the system seems to be a lack of reporting, which can be attributed to two possibilities. Firstly, the fear of victimization. The shame, the trauma of being answerable to varied questions could be a major factor. Many victims in 'The Hunting Ground' recount the kind of questions asked to them, which were not only disparaging but also indicating that the victims in fact, invited the trouble by their behavior and attitude. Secondly, the reason that many do not choose to report the objectionable behavior of the perpetrator may be because they do not trust the functioning of the ICC since they have either failed to take action against such instances in the past or that the perpetrator is still moving scot-free in spite of allegations against him. The ICC is not popularized in the campuses and many students do not even realize that there is a body that they can approach for redressal in case they are subjected to sexual harassment.

Under Section 3 (1) (q)[41] of the UGC Regulation, it also requires an annual report to be submitted by all HEIs in a simple format which is

[41] *Sec 3 (1) (q) (q) prepare an annual status report with details on the number of cases filed and their disposal and submit the same to the Commission.*

provided by the UGC. The below table shows the number of cases reported, which is published in the UGC Annual Consolidated Report.

	Year			
	01/04/2016 to 31/03/2017[42]		*01/04/2017 to 31/03/2018*[43]	
	Univ	*College*	*Univ*	*College*
Number of cases of sexual harassment received	186	248	63	11
Number of Complaints disposed of during the year	149	39	75	4
Number of cases pending for more than 90 days	139	39	73	4
Number of workshops on Awareness Programmes against sexual harassment conducted during the year	7	0	3	0
Nature of action	635	339	535	46
Internal Complaint Committee constituted or not	183	247	31	8

The total number of universities in the India as of 04.08.2020 is 950[44] and the total number of cases reported up to Jan 2020 is 171. With around 42338[45] colleges and about 30 million students, the report shows the miniscule effort taken by HEIs to curb the menace of sexual harassment at their respective campuses. This, in itself, makes it very evident that the institutions have not visualized the gravity of the issue. The UGC has to take note of this and take stringent action against HEIs who do not report. Also, the institutions which file a 'Nil' report should also be brought under the scanner and to access and ascertain if that is the true condition or if it morphed with any other excruciating factor.

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[42] *Consolidated Status Report of Annual Return on Sexual Harassment cases during 01/04/2016 to 31/03/2017, University Grants Commission Annual Report 2017-18, 1–294 (2018). (Last visited on Sep 29, 2020).*

[43] *University Grants Commission Annual Report 2018-19, https://www.ugc.ac.in/pdfnews/3060779_UGC-ANNUAL-REPORT--ENGLISH--2018-19.pdf pg. 30, (last visited on Sep 29,2020)*

[44] *https://www.ugc.ac.in/oldpdf/Consolidated%20list%20of%20All%20Universities.pdf (last visited on Sep 29, 2020)*

[45] *Growth of Higher Education Institutions in India, WELCOME TO UGC, NEW DELHI, INDIA, https://www.ugc.ac.in/stats.aspx (last visited Jun 16, 2019).*

In the book 'Lecherous Professor'[46] it has been pointed out that the rate of reporting incidents to the concerned authorities is diminutive when compared to the actual occurrence whether it is sexual harassment in the workplace or in the higher educational institutions. While researches conducted and the literature review show that sexual harassment is a common occurrence in HEIs, the numbers and figures projected in the UGC report show that there are hardly any incidents that requires any such attention. This huge gaping disparity makes one think about what the reality is. Is sexual harassment at the HEIs a myth, or are we chasing an ever-elusive mystical creature that surfaces to its victims but does not want to bring to the light of law or shame the perpetrators.

Findings and Conclusion

The findings to the study clearly indicate that

1. Students are aware about the incidents of sexual harassment in the HEIs.
2. They support in almost unanimity that there has to be a protection to all irrespective of whether they are students or employees and also irrespective of the sex of the victim
3. The results have also indicated that any person can be vulnerable to being sexually exploited or victimized
4. In case they come across a victim, most students have suggested that they will encourage reporting the incident to either the ICC or the Police, but they will not take to staying quiet about it.
5. More than 60% of the students also agreed that the campus has to be protected against same-sex sexual harassment.

Conclusion

There is a need to battle against sexual harassment in a higher education institution. There is a requirement for a more basic change that requires striking arrangements, so the instruction which is granted turns into a key to open the psyche of pioneers and not debases.

Security of the LGBTQA people group is additionally the need of great importance. Be that as it may, if the campuses are impartial, explicit assurance against sexual orientation based offences isn't needed. Sexual harassment will be considered as an offence in all instead of against a specific sex. A zero-resistance strategy to underwrite this ought to be on the need plan of each

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[46] *Billie Wright Dziech, Linda Weiner, The Lecherous Professor: Sexual Harassment on Campus (University of Illinois Press, 1990)*

educational Institution. Sexual orientation should matter just in a couple of connections, for everything else, it ought not to be the origin and education is one such zone. Education ought to be conferred with outright negligence to sex, race, caste and religion. So likewise, the assurance in educational establishment ought to develop as the balance for every administrative structure. Women empowerment is also better understood in the light of gender neutrality and not gender equality. The more emphasis is coordinated towards gender equality fairness, the more extensive it makes the gap. A work environment, an educational organization, a recreational center, or rather any professional realm ought to rise above past sexual orientation. Viability and fructification of the purpose can be cultivated when it is obstruction less, however, well inside the limit of moral principles.

While tending to the activities of a faculty or staff member as the culprit, nothing else ought to be perused along. The affinity of the offender with different students, how successful the individual is in their work, how significant the individual is to the Institution, regardless of whether any activity taken against the perpetrator would place the University's notoriety in peril, and so forth ought to be of least thought. Rebuffing the offender whosoever it might be ought to be the witticism of protection and avoidance of such offences and this should be the long - term vision of any HEI.

Most students know that there is the pervasiveness of sexual harassment in the campus and that they are vulnerable. A strict protection regime would surely make the campus a safe environment. If the right values are inculcated and if the students are molded into responsible individuals, there will surely be a change at the grass-root level in society. It is not just the language and sanction of the law but the willingness of the people to adhere to it, which makes it amenable and effective.

INTERNATIONAL RIVERS: CHALLENGES POSED BY THE THREAT OF CLIMATE CHANGE TO INDIA AND HER NEIGHBOURS*

Sri Mohan V. Katarki**

Introduction

South Asia is a home for large freshwater. Several mighty rivers flow in the basins of Indus, Ganges and Brahmaputra (IGB basins). The Himalayan glaciers and monsoons drain IGB basins perennially with abundant flows. The life of a large population of about 1.5 billion, countless animals and plants in India, Nepal, China, Pakistan, Bangladesh and Bhutan depends on these waters. The region is an exotic part of nature and undoubtedly a cradle of civilization from Harappan times, for about 5000 years. However, the threat of climate change is predicted to modify the hydrological cycle. There is a direct correlation between temperature and precipitation. The evaporation from the surface and snowmelt is temperature-dependent. But, despite such a threat looming large, India and her neighbours are staring at each other instead of addressing such threat institutionally.

International Rivers

The Rivers are the carriers of freshwater drained in the basin. The United Nations Environment Program (UNEP) has found that half of the basins in the world, numbering 263 basins,[1] are international or trans-boundary in nature since they traverse from one nation or state to another. The basins of these international rivers account for half of the landmass and generate about 60% of the freshwater available on the earth planet. Nearly about 40% of the population of the world depends on this water. Therefore, the management of waters of these international rivers has been the subject of international security. In fact, with regard to IGB, Professor Brahma Chellany has said that Himalayan water could be "*Asia's new battleground.*"[2]

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* S.G. Balekundry Memorial Lecture delivered on January 8th, 2020 at Institute of Engineers, Belgaum, Karnataka.

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1 Aaron T. Wolf, Altas of International Freshwater Agreements, United Nations Environment Programme 2002, I-2.

2 Brahma Chellaney, Water: Asia's New Battleground Harper Collins Publishers 2011.

Indus basin encompasses India, Pakistan and Afghanistan. However, for all practical purposes, Afghanistan is excluded because only one tributary, namely Kabul, rises in Afghanistan and enters Pakistan immediately. The waters of the Indus are shared between India and Pakistan under the Indus Treaty of 1960[3], which became necessary due to the partition of India in 1947 as present-day India and Pakistan. The Indus Treaty did not quantify the quantum of available water in the Indus basin. The treaty divided waters on the basis of tributaries. Three rivers, namely Ravi, Beas and Satluj, known as eastern rivers (Art II), have fallen to the exclusive control of India. However, three rivers, namely Jhalum, Chenab and Indus, known as western rivers (Art III), have fallen to the share of Pakistan, with some limited rights to India with regard to both irrigation and hydropower generation in western rivers. At present, it is estimated that India uses about 33 MAF of the waters of eastern rivers. There is no further scope for any expansion. On the other hand, western rivers generate about 136 MAF of water. Pakistan has used about 120 MAF of water, leaving the rest to the sea. Probably there is no water stress in Pakistan. However, there is certainly water stress in India. The 33 MAF of water has been found to be insufficient in India. Further, in the last three decades, the surplus water in the Ravi and Beas rivers, which was estimated at 17.17 MAF at average (1921 to 1960 series), has come down undisputedly to about 13.38 MAF (1981 to 2013 series) on an average. This reduction has been attributed to climate change by Punjab in its interstate disputes with Haryana and Rajasthan.

Ganges and Brahmaputra basins fall in China, India, Nepal, Bhutan and Bangladesh. At present, no treaty or agreement governs the distribution of water between the basin States. The construction of a series of Hydropower projects in China raised concerns in India, particularly with regard to summer flows. However, at present, India and China seem to have been satisfied with the exchange of data[4]. But the larger threat of transferring Brahmaputra water to the Yellow River in China is a matter of concern which India shouldn't be complacent of. China has taken up its inter-linking project known as the South-North Water Diversion Project. Under this project, the transfer of water from the Yangtze to the Yellow River, the Yellow river to Huaihe and from Huaihe to Haihe is proposed. Though this project does not seem to envisage

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3 Indus Water Treaty (https://www.treaties.un.org)

4 Mohan Katarki, Brahmaputra International River Commission. The Need of the Hour (A Commemorative Booklet Published by National Law University and Judicial Academy, Assam)

the transfer of Brahmaputra water to the Yangtze, physical possibility demands precautions to be adopted particularly in the light of the threat of climate change. Teesta river, unlike the main Brahmaputra river, is not free from dispute. India has ambitious plans to construct hydropower projects with a capacity of 50,000 MW. On the other hand, Bangladesh has the ambition to use Teesta water for summer irrigation. A treaty was sought to be finalized between India and Bangladesh, but the same had to be deferred by India in 2010 due to the protest of one of the States, namely West Bengal. But, Gages, similar to the Brahmaputra, doesn't have major issues at present. However, there are a couple of bilateral agreements between India and Nepal with regard to the Mahakali, Gandhak, and Kosi rivers, which are tributaries of the Ganges. Between India and Bangladesh, an agreement governs on the diversion at Farakka barrage. The main concerns between India and Nepal relate to Hydropower generation and flood control. However, the concerns between India and Bangladesh are with regard to summer flows.

Precautionary Measures by International Community on Climate Change

The threat of climate change, which has been engaging the world community, drew the attention of the United Nations (UN) in the early 1990s. It has a precursor. The thinning of the Ozone layer due to the reckless emission of certain gases was considered as serious harm to health and life on earth. The "Vienna Convention on Protection of Ozone Layer" was accordingly entered into between the States in 1985 to address the depleting Ozone layer. The world community succeeded in addressing the issue, as the "National Aeronautics and Space Administration"[5] has recently reported that Ozone is much much smaller than what was reportedly observed four decades back.

Soon after putting in place the framework for addressing the Ozone layer, the UN General Assembly by its resolution 43/53 (1989), firmly set the tone on climate change by declaring that global climate change *"... could be disastrous for mankind if timely steps are not taken at all levels"*.[6] The UN undoubtedly treated climate change as the common concern of mankind. This jurisprudential clarity helped to tackle the indifference among the States on a mistaken premise that they shouldn't bother about something which is not directly caused by them or from their territory. Eventually, in 1992, a

[5] https://ozonewatch.gsfc.nasa.gov

[6] https://www.research.un.org >ga>regular

framework of the legal structure was put in place known as the "United Nations Framework Convention on Climate Change"[7] (the Convention entered into force on March 21, 1994), engaging the world community in cooperative efforts to tackle the climate change issues. Article 1(2) defined climate change as: *"...a change of climate which is attributed directly or indirectly to human activity that alters the composition of the global atmosphere and which is in addition to natural climate variability observed over comparable time periods."* The Convention also defined in Article 1(1) the adverse effect of climate change as:*"....changes in the physical environment or biota resulting from climate change which has significant deleterious effects on the composition, resilience or productivity of natural and managed ecosystems or on the operation of socio-economic systems or on human health and welfare."* However, the Convention did not establish any machinery for the assessment of climate change or its adverse effects. Perhaps, UN, as well as States, thought that such machinery under the Convention is unnecessary because UNEP and World Meteorological Organisation (WMO) had already established the "Intergovernmental Panel on Climate Change" (IPCC) in 1988 with the consent of the UN General Assembly.

The IPCC conducted elaborate studies and submitted its five Assessment Reports in 1990, 1995, 2001, 2007 and 2014[8]. The advent of mathematical models enabled quiter crunching of data. The relevant observations in the last Report in 2014 are –

- From 1880 to 2012, the global temperature increased by 0.85^0 C on an average.
- Relative to 1850-1900, global surface temperature change at the end of the 21^{st} Century (2081-2100) is projected to exceed 1.5^0C. Warming is likely to exceed 2^0C
- Climate change will persist for many centuries, even if emissions are controlled.

The world community threatened by the threat of climate change as predicted by IPCC has adopted precautionary measures. Though there may not be hard evidence that climate change is indeed going to take place, the world community has committed itself to apply the legal principle of precautionary measures as agreed in the "Rio Declaration on Environment and

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7 https://www.unfccc.in

8 https://www.ipcc.ch

Development"[9] (RIO) in 1992 decided to act. Principle 15 of RIO declaration states - *"In order to protect the environment, the precautionary approach shall be widely applied by the States according to their capabilities where there are threats of serious or irreversible damage, the lake of full scientific certainty shall not be used as a reason for postponing the cost-effective measures to prevent environmental degradation."* The said principle mandates actions on issues concerning the environment, even though damage to the environment is uncertain due to a lack of scientific methods to assess. A landmark understanding in Paris in 2014 known as the "Paris Agreement"[10] (the Convention entered into force on November 4th, 2016) was announced to combat climate change and accelerate the action needed for reducing carbon emission and limiting the temperature. The important commitments undertaken by the States under the Paris Agreement are[11]:-

- Art.2(1) provides a commitment to maintain global temperatures 'well below' 2.0^0C above pre-industrial levels and to 'pursue efforts to limit' them even further to 1.5^0C.
- Art. 4(1) provides an aim to 'reach global peaking' of such emission' as soon 'as possible' and then to ensure that in the second half of the twenty-first Century there is a balancing out of such emissions using natural carbon 'sinks' to absorb excess emissions to a level which provides a 'net –zero' effect.
- Art.7 requires parties to submit an adaptation communication that sets out the adopted priorities, policies, plans and actions to be implemented as part of an overall adaptation strategy. These communications are subject to review under the five-yearly global 'stock-take.'

Impact of Climate Change on Water Resources

The adverse impact on the water resources is a critical question that has been generally addressed by IPCC in its Fifth Report in 2014. Climate change, though uncertain, is likely to be severe even if stringent action is taken today to curb emissions. Even if all emissions cease to exist today, the temperatures may still rise by 1^0 C above pre-industrial levels since emissions of CO2 remain in the atmosphere for well over 100 years.

The IPCC, in its fourth Report in 2007, observed that:- "*Warming of the climate system is unequivocal, as is now evident from observations of increases in global average air and ocean temperatures, widespread melting*

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9 https://www.legal.un.org

10 https://www.unfccc.in.

11 Stuart Bell etc, Environmental Law, page 542 (Ninth Edition)

of snow and ice, and rising global average sea level." It also projected that by mid-century, the "*Annual average river runoff"* may increase 10-40 percent at high altitude and in some wet tropical areas (southwest monsoon) and decrease by 10-30 percent in dry regions at mid-latitudes. Lastly, it cautioned that the sea level might rise by 14 - 44 cms, evapo-transpiration may also increase, *etc.* The projections of the IPCC, 2007, are based on the number of climate model runs at the global level. However, "hydrology is not an exact science." As such, there are many uncertainties in the model study. Besides, any model study is open to challenge, *inter alia*, on the grounds of authenticity of data and suitability or relevance for the basin.

The Report of the Working Group of IPCC, annexed to the fifth Report in 2014, updated its assessment on the question of hydrological changes due to likely climate change. The executive summary on Water Resources is:

- 7% of the global population is projected to be exposed to the decreased renewal of water resources for at least 20%.
- By the end of the 21st Century, the number of people exposed annually is likely to be three times greater.
- Climate change is projected to reduce renewable surface water and groundwater resources significantly in most dry subtropical regions. This will intensify competition for water among agriculture, ecosystems, settlements, industry, and energy production, affecting regional water, energy, and food security.
- Though there are no widespread observations of changes in flood magnitude and frequency due to anthropogenic climate change, projections imply variations in the frequency of floods.
- The frequency of meteorological droughts (less rainfall) and agricultural droughts (less soil moisture) are likely to increase in dry regions by the end of the 21st Century.
- The frequency of short hydrological droughts (less surface water and ground water) are likely to increase in dry regions.
- Climate change negatively impacts freshwater ecosystems by changing stream flow and water quality.
- Climate change is projected to reduce raw water quality, posing risks to drinking water quality even with conventional treatment.
- In regions with snowfall, climate change has altered observed streamflow seasonality, and increasing alterations due to climate change are projected (robust evidence, high agreement).
- Since nearly all glaciers are too large for equilibrium with the present climate, there is committed water resources change during much of the 21st

Century, and changes beyond the committed change are expected due to continued warming; in glacier-fed rivers, total meltwater yields from stored glacier ice will increase in many regions during the next decades but decrease thereafter (robust evidence, high agreement).

- There is little or no observational evidence yet that soil erosion and sediment loads have been altered significantly due to changing climate.
- Adaptation, Mitigation, and Sustainable Development are necessary for developing countries where there are many opportunities for anticipatory adaption. (medium evidence, high agreement).
- An adaptive approach to water management can address uncertainty due to climate change.
- Reliability of water supply, which is expected to suffer from increased variability of surface water availability, may be enhanced by increased groundwater abstractions

Impact of Climate Change on IGB Basins

The international rivers common to India and her neighbours namely China, Bangladesh, Bhutan, Nepal and Pakistan, seems to be adversely affected by climate change. The Working Group on Water Resources in its Report attached to the fifth Report of IPCC has given special consideration to Himalayan glaciers, which is the source of water for IGB basins (page 242, Box 3.1). The case study is extracted below (without Figure 3.3):

"… The total freshwater resource in the Himalayan glaciers of Bhutan, China, India, Nepal, and Pakistan is known only roughly; estimates range from 2100 to 5800 Gt (Bolch et al., 2012). Their mass budgets have been negative on average for the past five decades. The loss rate may have become greater after about 1995, but it has not been greater in the Himalayas than elsewhere. A recent large-scale measurement, highlighted in Figure 3-3, is the first well-resolved, region-wide measurement of any component of the Himalayan water balance. It suggests strongly that the conventional measurements, mostly on small, accessible glaciers, are not regionally representative. Glacier mass changes for 2006–2100 were projected by simulating the response of a glacier model to CMIP5 projections from 14 General Circulation Models (GCMs) (Radić et al., 2013). Results for the Himalaya range between 2% gain and 29% loss to 2035; to 2100, the range of losses is 15 to 78% under RCP4.5. The modelmean loss to 2100 is 45% under RCP4.5 and 68% under RCP8.5 (medium confidence). It is virtually certain that these projections are more reliable than an earlier erroneous assessment (Cruz et al., 2007) of complete disappearance by 2035. At the catchment

scale, projections do not yet present a detailed region-wide picture. However, the GCM-forced simulations of Immerzeel et al. (2013) in Kashmir and eastern Nepal show runoff increasing throughout the Century. Peak ice melt water is reached in the mid-to-late Century, but increased precipitation overcompensates for the loss of ice. The growing atmospheric burden of anthropogenic black carbon implies reduced glacier albedo, and measurements in eastern Nepal by Yasunari et al. (2010) suggest that this could yield 70 to 200 mm yr –1 of additional meltwater. Deposited soot may outweigh the greenhouse effect as a radiative forcing agent for snowmelt (Qian et al., 2011). The hazard due to moraine-dammed ice-marginal lakes continues to increase. In the western Himalaya, they are small and stable in size, while in Nepal and Bhutan, they are more numerous and larger, and most are growing (Gardelle et al., 2011). There has been little progress on the predictability of dam failure but, five dams that have failed since 1980 all had frontal slopes steeper than 10° before failure and much gentler slopes afterward (Fujita et al., 2013). This is a promising tool for evaluating the hazard in detail. The relative importance of Himalayan glacier meltwater decreases downstream, being greatest where the runoff enters dry regions in the west and becoming negligible in the monsoon-dominated east (Kaser et al., 2010). In the mountains, however, dependence on and vulnerability to glacier meltwater are of serious concern when measured per head of population."

The above conclusions are based on the "General Circulation Model"(GCM). Even otherwise, as the relationship between temperature and rainfall and snowmelt is direct, the adverse impact of threatened climate change on water resources is obvious. Both the sources of water – rainfall and snowmelt- are clearly at risk if the predicted global warming is going to be a reality. The impact on the water requirement of crops grown in the IGB basins is also apparent. The estimation of potential evapo-transpiration by Modified Penman Method prescribed by "Food and Agriculture Organisation"[12] depends on daily mean temperature. Similarly, soil moisture would be adversely affected by a rise in temperature. The rice, which is the predominant crop in these basins, is likely to demand more water due to expected global warming.

[12] FAO IRRIGATION AND GRAINAGE PAPER: 24

Downscaled Studies for Regional Prediction

A specific regional study, both mathematical and physical studies at each of the sub-basin level, are necessary to predict with more precision the adverse consequences of global warming on IGB basins. The GCM used by the IPCC was run for special resolutions of about 200 kms. However, the GCM outputs can be translated to finer resolutions or even point locations.[13] A downscaled models with 20 kms to 25 kms resolutions can account for regional climatic influences. One such downscaled model was run all over India showed a temperature rise from 2.5^{o} C to 4.4^{o} C. The author says, "such high regulation climate change information may be useful for researchers to study the future impact of climate change in terms of extreme events like floods and droughts."[14] Therefore, it is necessary that downscaled models ought to be run throughout IGB basins in India, China, Bangladesh, Bhutan, Nepal and Pakistan to meet the challenges posed by the threat of climate change.

Response of International Water Law

The international water law governing *inter se* rights of riparian States has not yet fully responded to the likely climate change. The rules of equitable apportionment or reasonable use as propounded in "*UN Convention on Non-Navigable Uses of International Water Courses*"[15] of 1997 do not specifically factor in the likely climate change. The "Helsinki Rules of 1966" and the "Berlin Rules of 2004" codified by the International Law Association do not specifically address on predicted climate change. However, the UN Convention,[16] Helsinki Rules[17] and Berlin Rules[18] do provide for consideration of climate as a factor. Therefore, the proof of predicted climate change can be invoked as a factor. Even the existing allocations of

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13 https://www.climatechangeinaustralia.gov.au/en/climate-campus/modelling-and-projections/climate-models/downscaling/.

14 Prashant Kumar Bal, Climate Change Projections over India by a downscaling approach using PRECIS [2016, 52 (4) Asia-Pacific Journal of Atmospheric Sciences,353-369]

15 https://www.legal.un.org

16 Art 6(1)(a) of the Convention on Non Navigable Uses of International watercourses: https://www.legal.un.org

17 Art V (2) (c) of Helsinki Rules : https://www.internationalwaterlaw.org

18 See, Art 13(2)(a) of Berlin Rules: https://www.unece.org

international water, whether by treaty or judicial allocation, can be reopened in the changed circumstances (*rebus sic stantibus)*[19]. Therefore, India and her neighbours China, Nepal, Bangladesh, Bhutan and Pakistan, must actively engage on the issues of climate change and its impact on the waters of international rivers. A regional cooperation is the need of the hour for India, China, Nepal, Pakistan, Bhutan and Bangladesh. The Mekong River Commission, established under the Mekong Treaty, has developed a program, namely the "Climate Change and Adaptation Initiative."[20] A similar permanent Commission must be established by a treaty amongst India, China, Bangladesh, Bhutan, Nepal and Pakistan to address and guide them on climate change and its impact on water resources sourced from Himalayan glaciers and monsoon, since both the sources are clearly at risk due to global warming.

Conclusions

The international community, through the UN, responded to the threat of climate change in the 1980s as a precautionary measure. Over decades, the level of threat of climate change due to global warming and its cascading effect on water resources, crop water requirement, soil moisture, *etc.,* has enhanced to a serious level, which cannot be ignored. The Paris Agreement in 2014 commits the international community to pursue their efforts to limit global warming to 1.5^0C above the pre-industrial limit. The flows of IGB basins depending on Himalayan glaciers and monsoon are at risk from global warming. The IPCC studies based on GCM are inadequate to face the threat of climate change and its impact on water resources in IGB basins. The predictions at the global level must be translated into regional predictions by downscaled models for better preparedness. The India, Pakistan, Bangladesh, Nepal, China and Bhutan, as basin States, owe an obligation to each other to institutionalize and conduct downscaled studies to face the threat of climate change and its cascading impact on water resources of IGB basins as the common concern of mankind as mandated by UN in the 1980s.

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[19] Mohan V. Katarki: If Climate Change is a Possibility, Will There be a Reallocation of International Waters (page 83, Inter-State & International Water Disputes, Edited by P. Ishwar Bhat, Published by Eastern Book Company, 2013)

[20] https://www.mrcmekong.org

CYBER SECURITY LAWS REGULATING E – COMMERCE SECTOR IN INDIA

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Introduction

As it is said, in the present world nothing comes without a cost and in business world, online shopping or e commerce is not an exception to this. A customer has unlimited choice over this platform, he can fall a victim to the choice which is made available to him and we see that a customer spends a good amount of time on this platform without making any final decision.[1]

In e-commerce one of the major options for purchase from the Internet is that, goods can be bought through debit card; credit cards; payment gateway platforms such as Paytm, PayPal, *etc.* It is thus quite possible that such customers may fall prey to security and privacy issues when shopping online.[2] However, with the option of COD (Cash on Delivery) the issue of privacy and security can be seen solved to certain extent as the customer who opts for COD may not be required to forgo personal details; however, still the threat of defect in goods or deficiency in service persists in an online purchase transaction.

In the recent times the internet has grown as an important component for quick and rapid purchase revolution which has breached into the busy lifestyle of the consumers. Whether it is for the purpose of communication or exploration; connecting with people or any official work, Internet is the go to tool for all this activities. With all these advancements the consumers are now turning more and more towards e- commerce for buying of goods at an affordable price[3]. Thereby, what we see is that, with the growth of internet it

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1 Saher Owais Talib, "E-commerce laws and regulations in India", Volume 3; Issue 4 International Journal of Multidisciplinary Research and Development, p. 66-67 (2016), *available at*: http://www.allsubjectjournal.com/archives/2016 /vol3/ issue4/3-4-30 (last visited on June 17, 2020).

2 *Ibid*

3 *Ibid*

has led to the growth of new developments such as e commerce; internet of things; Artificial intelligence, etc.

The customers like never before are buy goods and availing various services on the e commerce platform. Till recently, people used to book train, air or movie tickets online, but now they use it to purchase electronic, clothing, home and kitchen items; grocery and household supplies and beauty and health products and the list goes on. This change has happened due to the fact that people have realized the convenience and most importantly time saving factor, added with discounts and deals available online.[4] This has led the people from traditional physical stores to a virtual store. Thus, what we see is that, to reach and target such tech savvy consumers, a fierce competition is seen amongst e commerce tech giants on the web.

E-Commerce as a concept has evolved and developed in nations such as United States. These nations have put in place appropriate laws and enough infrastructure to deal with the needs of online consumers. This has helped the consumers not only to be secure by complying with the laws of these nations but also helping the nation in increasing its GDP.[5]

E-Commerce in India can be seen from a totally different prism. It has embedded within it all the advantages of commercial viability and profit making. However, on the regulation front, we do not see a dedicated e-commerce law, although we have the Information Technology Act, 2000, which is based on UNCITRAL (United Nations Commission on International Trade Law) model law.[6] The main purpose of this law was to grant legal recognition to all transactions which were done through electronic data exchange or by other means of electronic communication or e-commerce, replacing the earlier paper-based communication.

Regulating the e-commerce business in absence of one dedicated law has led to different agencies to intervene to regulate their activities, such as Enforcement Directorate (ED), SEBI and Competition Commission to protect the interest of the nation and consumers. Few major complaints have been in regards to quality, purity, price, unfair trade practices and predatory pricing

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4 *Supra* note 1

5 *Ibid*

6 *Ibid*

tactics followed by the Indian e-commerce giants.[7] However, to a certain extent, the Information Technology Act, 2000 and The Consumer Protection Act, 1986 protects the consumer against their unscrupulous exploitation.

I. Types of E-Commerce Facilities

Electronic commerce or e-commerce consists of the buying and selling of goods and servicing of products or services over computer networks. The Information Communication Technology (ICT) businesses may see this as an electronic business application aimed towards commercial transactions.

An alternative definition of electronic commerce may be viewed as the conduct of business which involve commercial communications and management using electronic methods, such as electronic data interchange and automated data-collection systems.

There are six types of E-commerce/e-business types:

i. Business to Business (B2B)
   The Business to Business is the one of largest e-commerce model. Here, both the sellers and buyers are business entities. In this model the transactions are basically between a retailer or a wholesaler or a manufacturer and wholesaler. Further, the transactions of B2B business model are much higher than that of B2C model.
   Example: Alibaba; Amazon business; Boeing; India-mart, to mention a few.[8]
ii. Business to Consumer (B2C)
   The B2C business is the most popular and predominant model. In this online model, the business sells goods directly to individual customers. This business model provides a direct interaction with the customers.
   Example: Flipkart; Amazon; Myntra, etc.[9]
iii. Consumer to Consumer (C2C)
   The consumer to consumer or C2C business model involves a transaction between two consumers, i.e. citizen to citizen. The best example of this model would be online auctions wherein a customer or visitor or seller posts an item for sale and other customer or potential

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7 *Ibid*

8 6 Types of E-commerce Business Models; available at: https://www.rapportrix.com/6-types-of-e-commerce-business-models (last visited on June 17, 2020).

9 *Ibid*

buyer bids to purchase it. However, in such transactions the third party generally charge a commission. Normally, C2C business requires immense planning and marketing knowledge as these sites act as intermediaries to bring the customers together.

Examples: eBay; OLX, etc[10]

iv. Consumer to Business (C2B)

The Customer to Business or C2B model involves customers selling their products or services to business. It is a typical model where a sole proprietorship/ entrepreneur are serving larger business. What differentiates C2B from other business models is that the value for the products is created by the customer and this caters to the needs of freelancers, who fulfil the given needs of their clients. In addition to this we see customers provide advertisements/reviews to goods or services in exchange of money.

Example: An influencer advertising the products of a company amongst his followers.[11]

v. Business to Administration (B2A) / Business to Government (B2G)

The Business to Government (B2G) is also referred to as Business to Administration (B2A) commerce. Here we see the government and business houses use central websites to do business with each other. This can be seen in public sector marketing, which means providing products and marketing services at multiple government levels. In this model, the business groups can bid on government opportunities, such as tenders auctions; online application submissions and providing IT support to the local government bodies.[12]

vi. Consumer to Administration (C2A)/ Consumer to Government (C2G)

The Consumer to Administration (C2A) or Consumer to Government (C2G) model enables the consumers to post feedback for the service/facility provided by the government or request for information in regard to public sectors services/facilities directly to the government administration or authorities' websites.

Example: payment of electricity bill, payment of health insurance, payment of taxes, etc.[13]

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[10] *Ibid*

[11] *Ibid*

[12] *Supra* Note 8

[13] *Ibid*

II. E - Commerce and Security Issues

The assets generated in E-commerce need to be protected from unauthorized use; unauthorised access, alteration or destruction of their data. Due to security issues the consumers fear the loss of their confidential information and e-commerce businesses fear to the loss due to break-ins. We see a great number of issues associated with e-commerce security, be it social or authoritative in nature. In regards to authoritative process we need to develop a proper chain of management for interconnecting security policies and its implementation through security tools. Further, it is often seen that in security lapses it is either the employee or users who are weak, rather than the technology, leading to security breach. One of the major problem or concern is the lack of willingness amongst the users to adhere to basic security practices or guidelines when using e commerce facilities. Example: Storage of passwords in unencrypted files; do not update their operating systems or browsers; etc.

A few security issues involved with e-commerce are as follows:

i. Denial of Service: In a denial-of-service (DoS) attack the legitimate users are not allowed to access the information systems, devices, or other network resources because of the actions of a cyber threat actor. The various forms of services that could be affected are websites, e-banking facilities and other services that depend on affected computer or network. In a denial-of-service attack the targeted host or the network is flooded with huge traffic till the target cannot respond or simply crash thereby preventing the access to a legitimate user. These attacks affect the e-commerce business both in terms of time and money as their resources and services are not accessible to the consumer. DoS attacks have grown into a complex and sophisticated attack as "distributed denial of service" (DDoS) attacks.

ii. Unauthorized access: In case of unauthorised access a person obtains logical or physical access to a computer system, its network, the applications and data involved or any other resource , without due permission.

iii. Credit card fraud: In recent time's Credit card fraud are the most common security threat faced by online retailers. This occurs when a cracker/hacker gains unauthorized access into customers personal as well as payment data. To access this, the hacker may force himself into the database of an e-commerce site with a help of malicious software programs. The data collected is often seen sold in the black market.

iv. Phishing Scams : E-commerce sites are not immune from phishing scams. With the use of social engineering, consumers may be lured to online shopping sites, through emails sent from known or unknown people and target the login credentials and credit card numbers, by forcing them to click a link which resembles e-commerce site.

III. Security for E-Commerce Applications

To counter the security issues few best practices that can be adopted are as follows:

i. Encryption: Encryption of data is a mode of scrambling data whereby only sanctioned parties can understand the information provided. In technical sense, it is the process where a plain text is converted into a cipher text. In simpler terms, it is a process where readable data is altered to appear in random. This process requires a key, a set of mathematical values (an algorithm), which is available with both the sender and recipient of message. This process helps to secure stored information and in secure information transmission.[14]

ii. Secure – Hypertext Transfer Protocol (S-HTTP): The Hypertext transfer protocol secure (https) is a secured version of HTTP. It is a primary protocol that is used to transmit data between the website and a web browser. HTTPS is always encrypted so as to increase the security of data transfer. Why is it important in e-commerce, because in an e-commerce website the consumer transmits sensitive data such as login credentials, banking details, purchase history, etc.[15]

iii. Digital Signature: A digital signature can be said as an electronic equivalent of a individuals physical signature. It is a mode that provides guarantee to the users that information has not been modified or tampered with. This helps in verifying the identity of the organization or an individual. Normally, digital signature is a hash of the message, which is encrypted, with the help of a public key and private key. These signatures are basically used to authenticate a website or to establish an encrypted connection between users.[16]

iv. Digital Certificate: A Digital certificate is an electronic credential which binds the identity of a certificate owner to a pair of encryption

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[14] Santosh Kumar Maurya and Nagendra Pratap Bharati, "Cyber Security; Issue and Challenges in E-Commerce" available at: https://www.worldwidejournals.com/paripex/recent_issues_pdf/2016/January/January_2016_1453357435__63.pdf (last visited on June 17, 2020).

[15] *Supra* Note 14

[16] *Ibid*

> keys, one public and one private, which are used to encrypt and sign data/ information digitally. A digital certificate ensures that the public key obtained in the certificate belongs to the individual to whom the certificate has been issued and thereby verifies that the individual sending a message is one who he claims to be. Normally, a digital certificate is issued by an authorised third party institution known as certification authority. The certificate contains the name of the company or the entity, the public key, a serial number allotted to the digital certificate, an issuance and expiration date, the digital signature of the certificating authority and any other identifying data.[17]

These best practices need to be adopted in order to maintain data confidentiality; help in authentication and identification of service providers and users; to have access control; to maintain the integrity of the data and see to it that there is non-repudiation of data.

IV. Cyber Security Laws and Policies regulating E – Commerce in India

The latter half of 90's saw tremendous growth in globalization and computerization. Countries computerised their governance systems and e-commerce saw enormous growth. Whereas, International trade and transactions till then were predominantly done through documents transmitted either by post or telex only. Similarly, in the administration of justice, evidences and records were paper based. However, with International Trade accepting electronic communication, and with email gaining momentum, a need was felt to recognize electronic records that are the information stored on a computer or an external storage.

In this regard, a Model Law on e-commerce was adopted in 1996, known as United Nations Commission on International Trade Law (UNCITRAL). In January 1997, the General Assembly of United Nations passed a resolution, recommending all the nations of the United Nations to give favourable considerations in adopting the said Model Law, which provides for recognition to electronic records.

The Government of India in order to facilitate e-commerce and provide legal recognition to electronic records and digital signatures realized the need to introduce a new law and make suitable amendments to the existing laws.

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[17] *Ibid*

This led to the enactment of Information Technology Act, 2000 (I T Act). In India, we see cyber laws embedded in the Information Technology Act, 2000. The Act provides a legal infrastructure for e-commerce and thereby having a major impact on e-businesses and the growth of new economy in India.

Under the I T Act, in regards to criminal offences that could be committed in e-commerce may be under the following offences:

i. Unauthorised access (hacking) :The offence of hacking is covered under section 43 and 66 of the I T Act, it states that any person accesses a computer or computer system without due permission commits an offence under section 66 he shall be punishable with imprisonment for a term up to 03 years or fine up to 05 lakh rupees or both.[18]
   Example: If an employee of a company (e-commerce giant) who has access to the confidential data and survey reports, helps a competing company gain access to this information through their network, then he shall be liable for the wrong of providing unauthorised access and thus liable.

ii. Denial of Service: The offence of Denial of service is covered under two provisions, Section 43(f) and section 66F of the I T Act, wherein the earlier provision is a general law applicable in cases of DoS, where as the latter section is applicable in cases of DoS which is in the form of a cyber terrorism act. The punishment for offence under section 43(f) is imprisonment up to 03 years or fine up to 05 lakh rupees or both and in case of section 66F it is imprisonment up to imprisonment for life.[19]
   Example: The hackers look out for the loopholes in the app software or web based server software to either crash it or hang the application or they may make the servers so busy that legitimate request connections would fail thus denying the customers access to the site and in turn affect the business of the e commerce companies.

iii. Phishing / Identity theft / Fraud: The offence of Phishing is covered under sections 66C, 66D and 74 of the I T Act. Section 66C provides for prosecution of a person for phishing attacks or identity theft and shall be punished with imprisonment up to 03 years and fine upto 01 lakh rupees. Section 66D covers for acts where there is cheating by personation and shall be punished with imprisonment up to 03 years and fine up to 01 lakh rupees. Section 74 deals with creating fraudulent

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[18] India:Cyber security 2020; available at https://iclg.com/practice-areas/cybersecurity-laws-and-regulations/india (last visited on June 18, 2020).

[19] *Ibid*

e- signatures and certificates and shall be punished with imprisonment up to 02 years or with a fine up to 01 lakh rupees or both.[20]

Example: A hacker pretends to be e-commerce company to the customer who already is a subscriber of it by sending a email and then the hacker may request for personal data or install a malware, and the customer thinking it is the e-commerce company, interacting with him, may share the data or click on a link for offers and thus installing the malware and become a victim of phishing.

iv. Breach of confidentiality and privacy : Section 72 and 72A of the I T Act, deal with breach of confidentiality and privacy and disclosure of information in breach of lawful contract. The punishment under section 72 is with imprisonment up to 02 years or with a fine up to 01 lakh rupees or both and in case of section 72A it is with imprisonment up to 03 years or with a fine up to 05 lakh rupees or both.[21]

Example: The customer in order to purchase a product on an online platform may provide his credit card details. Here if the card details are leaked out in public domain in breach of confidentiality agreement, the person who leaks such information shall be held liable.

v. Data Protection : In cases of failure to protect data, section 43A of the I T Act, states that the corporate body shall be liable to pay compensation appropriately, if it is negligent to implement and maintain reasonable security practices and procedures.[22]

Example: The e commerce entities deal with lots of data, be it users profile, their choice of purchases, payment details etc. Here the company owes the duty to protect such data, in case of breach of data protection, the entity will be held liable.

In addition to the provisions above stated, under the Information Technology Act, 2000 in furtherance of cyber security measures, various security standards and procedures have been created under the rule making power of IT Act, such as: The Information Technology (Reasonable Security Practices and Procedures and Sensitive Personal Data or Information) Rules, 2011 and Information Technology (Information Security Practices and Procedures for Protected System) Rules, 2018 to mention a couple of them. In addition to these rules there are sectoral cyber security

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[20] *Supra* note 18

[21] *Ibid*

[22] *Ibid*

related compliance regulations such as for banks and non banking financial institution.

Further, the National Cyber Security Policy, 2013 is an evolving task and it caters to the whole spectrum of Information and Communication Technology (ICT) users and providers including home users and small, medium and large enterprises and government and non government entities. It serves as an umbrella framework for defining and guiding the actions relating to security of cyberspace.

Conclusion

E commerce as a business model is connected with various sections such as Information Communication Technology, banking, retail, manufacturing, import and export, foreign direct investment, consumer protection and so on, and due do this interconnection of e -commerce with a variety of sectors, numerous laws, rules and regulations are applicable in this regard and this has created a daunting task for law makers and law enforcement agencies, especially in respect of maintaining the cyber security standards on par with international standards. With flaws and loopholes in the law and lack of strict enforcement of these laws, the cyber offenders get away, only to leave the consumers or e-commerce business enterprises victim of various cyber crimes and a mere spectator of these acts.

These concerns have reached at the highest level of Indian government and in this regard draft e-commerce law/ policy for India are being looked into. In addition, under the new Consumer Protection Act, 2019; draft E-commerce Rules under the said Act is been discussed by the law makers. The Personal Data Protection Bill, 2019 seeks to provide for protection of data and privacy of individuals, which could be seen applicable in e commerce as well. With all these new laws, rules and regulations being in the process of enactment, there seems to be a positive intent from the law makers to cater to the need of adequate cyber security in e-commerce.

Prevention is better than cure; thus, self regulation remains to be one of the strongest deterrence against cyber crimes in e-commerce as fraudsters are looking to take advantage of ignorant and errors made by online shoppers. Thus, the authors firmly believe that a dedicated e-commerce law for India is the need of the hour and amending the IT Act, 2000 to house e-commerce related issues is not a good option and it should be the last option of the law makers.

REVISITING THE ANCIENT IDEA OF CORPORAL PUNISHMENT IN SCHOOLS: IN THE BEST INTEREST OF THE CHILD

Dr. Kim Rocha Couto*

"Children are sick of being called 'the future'. They want to enjoy their childhoods, free of violence, now"
Paulo Pinheiro

Introduction

Children are the future of the nation. They are also among the most vulnerable sections of society. Development of the child in a safe, secure and conducive environment is in the best interest of the child and crucial for the holistic growth of the nation. Children must have access to such an environment at home, at school and in their neighborhood. Since a child spends much of his time at school in his formative years, it is imperative that the school in which he is placed presents an environment free of the threat of corporal punishment, which facilitates the learning of subjects, skills and values.

Interestingly, one finds that education in ancient India had its focus on the intellectual development and character building of the learner. The twin objective of the traditional system of learning was to create useful and good persons in society. In the case of a delinquent learner, the punishment was meted out with the objective of self-reform, implying the correction of unrighteous behaviour. Observances of fast and such other spiritual modes of atonement by erring students were generally advocated for the purpose. To quote from a verse in the Manusmriti "*Let him punish first by (gentle) admonition, afterwards by (harsh)reproof, thirdly by a fine and after that by corporal punishment*."[1]

In contemporary times, the teaching-learning environment in schools has undergone several changes. The use of corporal punishment on school children is slowly becoming ubiquitous.[2] In addition, physical punishment

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1 Available at https://www.sacred-texts.com/hin/manu/manu08.htmlast accessed on 15/2/2019.

2 Available at https:// www.unicef.org/publications/files/ violence_in_ the_lives_ of_children_and adolescents . See also Ashwini Tiwari, "Making Our Judgments Right: Ethics of Corporal Punishment in Indian Schools",8(5)International

used on children is turning out to be severe and harsh. Gruesome instances of children being punished cruelly in schools in various parts of the Country are startling and disquieting.[3] Educators and school authorities are becoming perpetrators of violent acts against children for issues as trivial as not doing homework or for forgetting to bring a school book to class. In other cases, children are physically punished for talking in class or reaching late to school. The modes of punishment adopted generally range from light to severe forms depending on the nature and extent of misbehavior as well as on the administrator of the punishment. In some situations, while spanking, slapping, hitting, beating, or physical abuse of a child is practised, in others, force is exerted through the use of implements such as wooden rulers, sticks, canes, leather belts or rubber hoses. What is worse is that children, out of fear, either do not report the matter to their parents or even where it is reported, parents are reluctant to demand that action be taken against the errant teacher. The wrong thus goes on uninhibited and unchecked.

Use of corporal punishment in school violates the enjoyment of the rights guaranteed to children under the law. Child rights jurisprudence is clear on the point that corporal punishment should not be used against children. India's commitment to honour the provisions of the United Nations Convention on the Rights of the Child[4] and the protection given to children under the Indian Constitution have all necessitated the introduction of a ban on corporal punishment. In these circumstances, there is a pressing need to evolve strategies to root out the evil of corporal punishment in schools and move towards positive disciplining techniques in their place.

In the first part of this paper, the author highlights the issues and concerns about using corporal punishment on children at school and supports the views with findings from research studies conducted worldwide. In the second part, the author discusses the law and judicial opinion on corporal

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Education Studies; 70(2015) available at https://eric.ed.gov/?id=EJ1060929 last viewed on 16/2/2019.

[3] Failure to do her Math homework, cost a young girl of 10 years her life, when she was made to kneel down for two hours which resulted in muscle cramps that affected her blood circulation. In another case, some girl students had to complete a number of running laps on the play ground without their skirts, for not completing their homework .Available at http://nhrc.nic.in/press-release/corporal-punishment-school-children

[4] United Nations GA Res. 44/25 Convention on the Rights of the Child (1989), United Nations Treaty Series, Vol.1577, p.3.

punishment at school. In the third part, the author puts forth recommendations for the use of alternatives in disciplining by citing approaches adopted in other countries.

A. Corporal Punishment: Meaning, Modes and Concerns

Corporal punishment, according to Professor Murray Straus, "is the application of physical force on a child in a manner that causes pain, not injury for the purposes of correction or control of the child's behaviour."[5] The purpose of such punishment being - to deter the child from misbehaving, prevent the recurrence of such behavior or to set an example for others by the infliction of unpleasant outcomes.[6]

There are essentially two pressing concerns regarding the use of corporal punishment in schools in India. The first is that most educators directly go on to use corporal punishment on 'erring' students even before trying alternatives to correct the inappropriate behaviour. It is sometimes the case that teachers and administrators react in haste to student indiscipline and related matters and, in doing so, often do not realize that their actions can produce harmful consequences. In other cases, educators fail to take preventive measures to mitigate the risk of harm likely to be caused by their actions. Measures taken like hitting the child, making him/her kneel down on stones, flinging objects at the child, *etc.,* done in the heat of the moment, may result in adverse consequences for the concerned child. What makes matters worse is that schools do not have a well-detailed protocol on classroom/school discipline. The result - the methods of discipline followed in schools vary between educators in the same school and between schools in the same State or across the Country. In the absence of a protocol or guidelines for maintaining discipline in the classroom, there is a well-founded apprehension that children may become vulnerable victims of their teacher's negative emotions.

The second is that harsh physical punishments are increasingly becoming a common experience for several children supposedly not adhering to school norms.[7] Even where punishment is applied is light or mild, physical

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5 Available at https://www.bostonglobe.com/metro/...straus...corporal-punishment.../story.html last viewed on 12/11/ 2019.

6 Apparently intended in situations of serious breach of discipline, the reality is that corporal punishment has been used even in case of minor mistakes.

7 Guidelines for Eliminating Corporal Punishment in Schools available at https://ncpcr.gov.in/showfile.php?lid=153last accessed on 11/1/2019

punishment carries an inbuilt risk of escalation. The effectiveness of such punishment decreasing with time, the administrator feels compelled to increase the punishment.[8] It is lamentable that although such punishment is prohibited, physical punishment against children at school is still in use.[9] Given below are some of the challenges in eliminating corporal punishment at schools, followed by reasons as to why the evil must be done away with.

Impediments in Rooting Out Corporal Punishment

Many factors can be attributed to the continued use of corporal punishment in schools, despite it being in violation of the rights of the child. The use of force on children within the school environment is on account of the interplay of several factors. While social and structural drivers do play a role, educators' personal experiences and beliefs also impel the use of force and the continuance of evil.

In the first place, corporal punishment is used as a child-rearing practice in some cultures since centuries. This practice is seen as the appropriate, socially acceptable and conventional method of disciplining children. According to Donnelly and Strauss, corporal punishment is viewed as a "*customary and necessary technique of child-rearing*" (Donnelly and Strauss 2005).[10] Its persistent use by certain cultural groups has been justified in its supposed ability and effectiveness in deterring, controlling and changing behaviour. These cultures, therefore, approve of teachers using physical force on children in school on the ground that it promotes effective learning. Believing that such punishment has got a number of positives, they are not opposed to the idea of teachers making use of corporal force on their students for their good education.

Personal experiences do shape educators' decisions to use physical punishment on children. Educators believe their own personal experience of

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[8] Available at http://endcorporalpunishment.org/wp-content/uploads/research/Research-effects-review-2015-05.pdflast accessed on 21/2/2019

[9] Government of India, Study on Child Abuse: India (Ministry of Women and Child Development, 2007) p.54 where the report indicates that every two out of three children have been victims of corporal punishment. The situation regarding the use of corporal punishment is as true today as it was a decade ago. Available at https://www.childlineindia.org.in/Ministry-of-Women-and-Child-Development.html last accessed on 2/2/2019.

[10] Donnelly and Strauss(ed.), "Corporal Punishment of Children in Theoretical Perspective", Yale University ,4 (2005).

punishment as children helped mold them into better individuals.[11] Such punishment is viewed as an ideal method of ensuring compliance and obedience in children. Others find that its use does not result in negative consequences but rather "helps children to become responsible and competent."[12] Some educators find the use of physical punishment in the classroom indispensable, presumably to maintain discipline. It is frequently argued that corporal punishment has a constructive effect in producing an immediate change in deviant behaviour, particularly, as the punishment is generally inflicted soon after the delinquent act is committed. This supposedly enhances the effectiveness of punishment and is capable of producing a change in behaviour.[13]

Some also argue that the lack of suitable alternatives to corporal punishment may be a contributory factor in its continuance. This scenario, according to Ngidi, is on account of teachers not having access to viable alternatives to corporal violence. For some other teachers, the problem lies in not knowing what to do in the absence of corporal punishment. [14] Other authors contend that limited research and lack of awareness among teachers regarding the baneful effects of physical punishment has prompted its continued use.

The second more challenging concern is that the interplay between the law and children is quite complex in nature. Due to their psychological immaturity, the law has declared that children require protection from deviance. It is, therefore, logical to assume that the law requires that children who are in school are also duly protected. Schools have a responsibility to look after the interests of the children entrusted by parents within their care. The common law doctrine of '*in loco parentis'* is an example of one such obligation/duty of the school and its teachers towards its students. The common law doctrine 'in loco parentis' allows delegation of authority by the

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[11] Discussion on perceptions on corporal punishment, available at http://ncpcr.gov.in/ showfile.php?lid=153 last accessed on 19/11/2019.

[12] Available at https://www.jahonline.org/article/S1054-139X%2803%2900042-9/fulltext last accessed on 12/11/2019 & http://childlineindia.org.in/pdf/MHRDAdvisory_for_Eliminating_Corporal_Punishment_in_Schools_under_Section_35.pdf last accessed on 10/11/2019.

[13] See S.M.Afzal Qadri,Ahmad Siddique's Criminology, Penology and Victimology, 254 (Eastern Book Company Publishing ,Lucknow, 2016).

[14] David Ngidi, " Educators Usage of Different Disciplinary Measures as Alternatives to Corporal Punishment", Journal of Educational Studies Volume 6 (1)122(2007) available at ir.cut.ac.za/bitstream/handle/11462/241/ Ngidi.pdf?sequence=5&isAllowed=y last accessed on 30/1/2019.

parents to the teacher to use a *reasonable* amount of chastisement to correct the behavior of their children, which is not appropriate.[15] It is clear that the purpose of the doctrine is not punishment *per se* but to inculcate desired values in the child.[16] The doctrine seeks to discourage certain antisocial or wrongful behavior in school students with the object of ensuring that the welfare of the child is safeguarded in the future. Quite often, in recent times, the same doctrine is invoked by schools/teachers to justify the use of physical punishment on their students. Repeated instances of its use on school students across the Country, goes on to show that educators and teachers have misunderstood the doctrine and interpreted it to mean that they have a right to chastise their students in any manner and to any extent, they think necessary.

One also finds that the doctrine of *loco parentis* has met with approval by the courts in some of the judicial decisions in the pre-Constitution era.[17] In some of these cases, the courts have recognized the teacher as a substitute of the parent in school with discretion to administer discipline on the child. But in other cases, the expression 'reasonable chastisement' used in the doctrine has been the subject of concern for the courts, indicating that the expression has resulted in confusion, misinterpretation and its incorrect application in the learning environment.

The fact is schools across the country continue to use corporal punishment despite it being forbidden by law.[18] The tendency and the trend to use corporal punishment to address discipline at school is associated with certain misconceptions about its effectiveness. These factors make it challenging to totally eliminate evil. A perusal of the main factors contributing to the continuance of the use of corporal punishment on school-going children, discussed above, indicates divergence of opinion about its importance in disciplining school children. While some educators opine that it is imperative, others do not support the view.

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[15] Available at http://usedulaw.com/345-in-loco-parentis.htmllast accessed on 28/03/2019.

[16] See Alan Hall and Margaret Manins,"In Loco Parentis and the Professional Responsibilities of Teachers," 7 Waikato Journal of Education 118(2001).

[17] See also G.B. Ghatge v. Emperor (AIR 1949 Bombay 226) where the Court held that infliction of moderate physical punishment by a teacher on a student does not amount to the commission of an offence.

[18] See Report of UNICEF India Available at http://unicef.in/Story/197/All-You-Want-to-Know-About-Corporal-Punishment last accessed on 2/11/2019.

But research studies conducted and documented regarding the effects of corporal punishment makes it amply clear that its use on children in schools must end.

Cogent Reasons to Eliminate Corporal Punishment in Schools

While corporal punishment is advocated for reasons such as child discipline and enhancing the academic performance of school children, there are strong arguments supported by research findings that suggest otherwise.

a) **Ineffective Deterrent:** The argument that corporal punishment is effective as a deterrent is weak. Various studies conducted around the world do not seem to support the view that corporal punishment has any deterrent effect in particular. Studies by *Gershoff* and others indicate that the use of corporal punishment has been successful in securing immediate compliance and obedience in children but is less successful in establishing the desired patterns of behaviour later in life.[19] In other words, the deterrence sought to be achieved through the use of corporal punishment is only temporary, not long-lasting. It is common knowledge that for any punishment to be effective, it needs to be swift, sure and severe. This would imply that the punishment has to be administered more regularly in order to achieve the desired outcome in the child. Such enhanced and recurrent use of physical punishment is likely to develop into physical abuse to the detriment of the child.[20] Punishment it may be noted, does not resolve any problem. On the contrary, it instills fear in the child. The child may avoid repeating the offensive behavior for fear of more severe punishment. Corporal punishment does not provide answers to the child as to why their behaviour was wrong or what they should do instead.[21] Except for causing pain, discomfort and humiliation to the child, corporal punishment serves no other effective purpose. Hence the means used do

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[19] See Brouwer Jason James "Corporal Punishment, The Theory of Planned Behavior and Changing Intentions for Future Parenting Techniques" 2 (2010) available at http://utdr.utoledo.edu/theses-dissertations last accessed on 2/11/2019 in which the author has discussed about the effects of corporal punishment.

[20] Gudyanga E and ors.," Corporal Punishment in Schools: Issues and Challenges," 5 (9) Mediterranean Journal of Social Sciences 497 (2014).

[21] See Poor Moral Internalization and Increased Antisocial Behaviour available at http://endcorporalpunishment.org/wp-content/uploads/research/Research-effects-review-2015-05.pdf last accessed on 2/2/19.

not justify the end. It is therefore clear that the administration of such punishment can hardly qualify to be in the best interest of the child.[22]

b) **Serious Health Consequences:** Children by the very fact of their tender age are physically, mentally and emotionally different from adults. Their needs differ from those of adults. Their vulnerability requires them to receive care, protection and understanding. The Convention on the Rights of the Child stipulates that State parties must take measures to ensure the child such protection and care, as is necessary for his/her well being.[23] Educators must avoid using force on children to discipline them. This is because children's bodies are tender and there are certain anatomical aspects that have to be kept in mind before any application of force on them. [24]

Medical science shows that the amount of force required to be used to cause injury in children is relatively less than is necessary for adults. So a "slight" or "reasonable" application of force could result in grave injuries to a child.[25] In situations where school children are "guilty" of misbehaving, it is difficult for the educator to gauge the amount of force to be applied on the child as punishment. As a result, although the consequences may have been unintended, there is a great likelihood of consequences detrimental to the well being of the child being caused. Inflicting corporal punishment on children, therefore, aggravates the risk of harm to them as they are both biologically and psychologically immature. Moreover, research studies have concluded that the use of physical force on growing children leaves them with mental health problems when older. Hence its use should be avoided as children have the right to be protected from all forms of violence under the law.

c) **Enhanced Aggressive Tendencies:** The argument that the use of corporal punishment has helped to make children better and more responsible citizens does not have any conclusive evidentiary support. In fact, studies by the Society for Adolescent Medicine have revealed that moral character

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[22] See the Convention on the Rights of the Child: Guiding Principles: General Requirements for all Rights available at https://www.unicef.org/crc/files/Guiding_Principles.pdf last accessed on 6/2/19. The principle of best interest implies that adults should do for what is best for children.

[23] Supra note 4. Article 3.

[24] Dr. C.S. Makhani, *"*Corporal Punishment in Schools: A Medico-Legal View*"*, 22(2) Journal of Forensic Medicine, Science and Law 2(2013).

[25] Id. See also M.A. Rajalakshmi, "A Review of the Effects of Corporal Punishment on Brain Development in Young Children", 3(2) International Journal of Advanced Scientific Research and Management 30(2018), available at https://www.researchgate.net/publication/323378006 last accessed on 1/1/2019.

development or even the social skills in children do not get enhanced by the use of physical force against them.[26] Besides being a traumatic experience for the child, it also sends out a wrong message to children. Studies indicate that the use of violence on children increases aggression in those children. It is common knowledge that 'violence begets violence.' When adults use violence against children, "it teaches children that violence is the acceptable means of dealing with the conflict."[27] They, in turn, use violence to settle their disputes with their peers and siblings. Studies indicate that corporal punishment is linked to the cultivation of negative and violent behaviour patterns in children.[28] In fact, as per studies conducted, the aftermath of the imposition of the ban on corporal punishment in some countries was found to bring down the incidence of crime by young people.[29] Educators should, therefore avoid responding to wrongs by minors by using harsh methods. Children exposed to violence perceive violence as a natural response to deal with situations or persons with which or whom they disagree. Recent research studies on this phenomenon show that in countries that have banned corporal punishment, the incidence of violence among youth is on the decrease.[30]

(d) **Results in Traumatic Experiences:** Use of intentional violence on children often results in a psychological impact on their young minds.[31]Apart from pain and the unpleasant consequences, corporal punishment reduces the self-esteem of a child. When it occurs in the presence of fellow students, the child feels humiliated, guilty, ridiculed and awkward. Punishment of such a nature, therefore, has the potential to mar a child's future for life. Studies suggest that instead of achieving the desired purpose, the use of physical force on a young child encourages defiance and disobedience in the offender.[32] It also adversely impacts

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[26] Available at https://secure.jbs.elsevierhealth.com/action/getSharedSite Session?rc=1&redirect=https%3A%2F%2Fwww.jahonline.org%2Farticle%2FS1054-139X%252803%252900042-9%2F fulltext

[27] For discussion on Corporal Violence Makes Other Violence in Society, see http://endcorporalpunishment.org/wp-content/uploads/research/Research-effects-review-2015-05.pdflast accessed on 14/2/19.

[28] Id.

[29] Id.

[30] According to a study conducted by researchers from USA, Canada and Israel which have been published in a Medical Journal available at https://qz.com/1431652/new-evidence-against-spanking-and-corporal-punishment/

[31] Id.

[32] Supra note 18 discusses the impact of corporal punishment on children.

his/her educational outcomes. The fear of corporal punishment makes the child take a dislike for learning, causes him to absent himself from school, which ultimately affects his grades. It is also one of the causes for children dropping out from school and for nurturing suicidal tendencies in them. Use of violence by the teacher destroys the confidence of the children and undermines the relationship between teacher and pupil. Besides, leading to mental health problems, adverse educational outcomes have also resulted from the use of corporal punishment.

(e) Morally Wrong: Physically punishing young children is invariably degrading and debasing."…To beat the feeble and the defenseless is an act which is seen at once to be unspeakably cowardly and mean…"[33] Corporal punishment has been commonly used as a form of punishment for criminals. Such a punishment takes the form of flogging, whipping, caning and the like. Children who break school or class rules are not criminals and cannot be administered punishments of such nature. Penology studies have shown that such punishments on adult criminals are neither effective nor useful which are sought to be done away with. These punishments are in fact, barbaric in nature and it is erroneous to use such kinds of punishment on young children. It may be argued that teachers are authorities in the classroom, but it is also their moral duty to ensure that they act ethically and rationally, showing respect to the rights of the students they teach.

(f) Prohibited by Law: Last but` not the least, use of corporal punishment in schools is prohibited by the law in India. Its use is contrary to international laws relating to children and national/State legislations. On the contrary, children are to be given special treatment under the law. With growing research on the ill-effects of corporal punishment on young children, the Indian Parliament has forbidden the use of corporal punishment on children at school.[34]

B. Corporal Punishment and the Law

Children have no adequate means of raising their voice against corporal punishment inflicted on them.[35] They are compelled to submit themselves to

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[33] Henry S. Salt, "The Ethics of Corporal Punishment," 16(1) International Journal of Ethics 82(1905).

[34] The Right of Children to Free and Compulsory Education (RTE) Act, 2009, Juvenile Justice(Care and Protection of Children) Act,2015

[35] See Global Report, Report on Corporal Punishment of Children in India, Global Initiative to End All Corporal Punishment (2017) available at www.endcorporalpunishment.org last accessed on 24/1/2019 where in the States of Goa, Andhra Pradesh, Telangana, and Tamil Nadu, laws have been enacted to

the acts of aggression inflicted by their educators out of fear and dread. This is contrary to the stipulations laid down in the international and national jurisprudence on child rights. For a promising future, children need to enjoy the recognition and protection of their rights guaranteed by the law.

International human rights law is strongly evocative regarding the dignity of every individual, which includes children. The Universal Declaration of Human Rights as well as the two International Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights – uphold respect for a person's dignity, physical integrity and equal protection under the law. The use of corporal punishment is an assault on the human dignity of every individual, however young.

Recognizing that a child should be allowed to develop his personality to the fullest, the Convention on the Rights of the Child, 1989, explicitly stipulates protection to the child from all forms of violence while in the care of the parent, legal guardian or any other person who has the care of the child.[36] The Convention urges States to take such steps as would ensure that school discipline is administered in a manner consistent with a child's human dignity.[37] Every State Party to the Convention must take effective steps in an effort to safeguard a child against violence. Moreover, the Convention also mandates procedures for the effective identification, reporting, referral, investigation, treatment and follow-up of cases that entail the abuse or maltreatment of children as is in the interest of children. Children are also not to be subject to torture or other cruel, inhuman or degrading treatment or punishment.[38] The Committee on the Rights of the Child has also underscored that such punishment is invariably degrading.[39]

The mandate of the law is clear. A child must be and feel safe while he learns at school. In other words, as per the terms of the Convention, there is zero-tolerance to violence in any form against children. India has acceded to this Convention in 1993 and is bound to give effect to its provisions.

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protect children against corporal punishment. In Delhi and Calcutta, through the rulings of the Court corporal punishment has been declared unlawful.

36 Supra note 4.Article 19

37 Id. Art.28 para 2.

38 Supra note 4. Article 37(a)

39 Committee on the Rights of the Child, General Comment No. 8 (42nd session, 2006),UN Doc. CRC/C/GC/8 (2006).

At the national level, one finds that the Constitution of India denounces discrimination and upholds protection to the rights of children. For the actualization of fundamental rights, the State has enacted various laws for the welfare and protection of children. The Right of Children to Free and Compulsory Education (RTE) Act, 2009, proscribes physical punishment or the mental harassment of a child in a school setting.[40] In case of non – compliance, the violator would be subject to disciplinary action in accordance with service rules applicable to the violator.[41] Furthermore, the Act provides that discrimination in any form against a child belonging to either the weaker sections or the disadvantaged groups is to be discouraged.[42] The Act clearly seeks to ensure a healthy and safe environment free from violence, which is conducive for learning, where along with the right to development, other crucial rights of young learners can also be realized. Use of corporal punishment by any person in charge of or employed in a child care institution is penalized under the Juvenile Justice (Care and Protection of Children) Act, 2015.[43] In the State of Goa, the *Goa Children's Act, 2003*, specifically bans corporal punishment in schools.[44]

The National Policy for Children 2013 aims at addressing the continuing and emerging challenges that confront children in various spheres of survival, health education, protection, among others. While emphasizing that learning must occur in a safe and secure environment, the Policy also maintains that all processes of teaching and learning are child friendly.[45]At present, efforts are on to prepare a draft National Child Protection Policy, which aims at securing zero tolerance for child abuse incidents.[46]

The National Commission for Protection of Child Rights has also issued guidelines to all States and Union Territories for the purpose of ensuring that corporal punishment in schools is completely eliminated therefrom.[47]

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40 The Right of Children to Free and Compulsory Education, Act,2009, Sec 17(1)

41 Id. Sec 17(2)

42 Id. Secs. 8 and 9.

43 The Juvenile Justice (Care and Protection of Children) Act,2015,Section 82. See also section 23.

44 The Goa Children's Act, 2003, Section 4(12).See also R.26 in Goa, Daman and Diu School Education Rules, which does not allow corporal punishment as a disciplinary measure.

45 See Para 4.6. (viii) and (ix)

46 Available at https://www.thehindu.com/news/national/centre-drafts-child-protection-policy/article25776159.ece

47 Supra note 7 at 7.3.1 at p. 16.

Court rulings in this regard have generally been clear and unequivocal. Almost two decades ago in Parents Forum for Meaningful Education v. Union of India*,[48] while recognizing that a child is a precious national resource to be nurtured and attended with tenderness and care, the Delhi High Court held that use of corporal punishment to discipline a child does not form a part of education on account of the baneful effects it has on children. The Court struck down the impugned rules holding them to be violative of the provisions of the Indian Constitution. This decision in consonance with international child rights jurisprudence and the Constitutional scheme unequivocally confirmed the position that corporal punishment against children was prohibited in schools. Similarly, the Gujarat High Court in* Hasmukhbhai Gokaldas Shah v. State of Gujarat *clearly observed that the use of corporal punishment on children in present days is not recognized by law.[49] One finds that although Courts have variously ruled against the use of corporal punishment, nevertheless, Courts have not been clear in conveying what is actually meant by the expression 'the best interest of the child'. Determining the best interest of the child is, in fact, the acid test laid down by the Convention on the Rights of the Child to identify whether a particular decision will in keeping with the well-being of the child. The UNHCR has endeavored to lay down the criteria which need to be taken into account while looking into*

C. Lessons to be learned:

In the first place, there is a need to abolish the term 'punishment' in all discourses relating to children as children are not per se criminals. No doubt, they may show behaviour that deviates from the so-called accepted standards or norms laid down in society, for which punishment is not the answer but alternate corrective measures. In this regard, teachers may be told to strictly adopt other methods of discipline which are corrective in nature rather than being only punitive.

It is also not enough to ban the evil of corporal punishment in schools without placing alternatives before educators. Schools must ensure that alternatives to corporal punishment are provided for the purpose of enforcing discipline, as is done in other countries. Availability of alternatives capable of being accessed by teachers must be in place. The State can adopt the approach

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48 AIR 2001 Delhi 212.

49 Criminal Appeal No. 17 November 2008. But in Rajan@Raju v. State Crl. MC No.237 of 2018, the Kerala High Court held that the use of reasonable force by a teacher on a student to discipline the latter did not amount to a crime under the provisions of the Indian Penal Code.

followed in South African schools. A document that serves as a Practical Guide for teachers and educators has been developed by the Department of Education for South African schools to maintain discipline within the classroom. It lists out various disciplinary measures for different levels of misconduct as alternatives to corporal punishment. While level 1 of the Guide mentions the kinds of minor misconduct within the classroom and the appropriate action to be taken, level 2 deals with breaking of school rules and the suitable response in such situations. Similarly, levels 3 and 4 deal with degrees of misconduct ranging from serious to very serious misconduct. The fifth level deals with acts that are criminal in nature and violate the law of the land. Some of the corrective measures that may be adopted by the educator include verbal warnings, community service, losing credits which have already been gained, the performance of small menial tasks and the loss of certain privileges during detention.[50] Other viable alternatives to the use of corporal punishment adopted in some schools in the United States of America are the use of positive reinforcement strategies and social reinforcers such as feedback from teachers and peers to enhance the self-esteem of the student.[51]Positive classroom management procedures are found to be more effective than using harsh punishments, which have a demoralizing effect.[52]

There is a need for proper sensitization of the school authorities, including educators, regarding the rights of children. Children have a right to be protected from abuse, exploitation, violence and other practices that may be harmful to them. Teachers and others dealing with children need to be made aware of the rights of children and strive to respect those rights.

Also, there is a need for teachers to realize the significant role they play in the life of their students. They must see themselves as 'instruments to inspire hope, ignite the imagination and instill a love of learning in their students". Respect for bodily integrity and human dignity must begin within the classroom. Teachers must endeavor to prevent violent extremism, hatred, racial or religious intolerance through thought, word and action. Ultimately, it would pave the way for an environment that is safe and supportive for learning and for life.

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50 Supra. note 14.

51 Alternatives to Corporal Punishment, Michigan Department of Education (1992) at p.8 available at https://www.michigan.gov/documents/mde/ corporal_ punish ment_alternatives_193705_7.pdflast accessed on 28/8/2019

52 Id.

Another method is for teachers/ educators to be trained to promote self–regulation and self-discipline in school children who would eventually be more productive as compared to placing reliance on externally enforced disciplinary measures. Students must be taught personal responsibility for their actions. Logical consequences such as deprivation of privileges may be applied in case of irresponsible or reckless behaviour.[53]

The Way Forward

If children are to have a better future, there must be measures and mechanisms in place to prevent them from being victims of violence in educational institutions.

School authorities and educators need to be sensitized about the law that protects children from violence. For this purpose, 'Child Rights' must be brought within the school curriculum, particularly, the right to bodily integrity and protection from all forms of violence as outlined in children's rights jurisprudence. Teachers must be cautioned about the legal consequences of using corporal punishment on children. They must be made aware that non-compliance with the law would entail stringent penalties for the violator**.**

Teachers also need to be trained to deal with discipline issues that may arise within the classroom. Standard Discipline Protocols that provide direction to teachers in matters relating to student discipline must be made available. Alternatives to the use of corporal force in the form of nonphysical disciplinary tasks should be discussed and explained.[54] There needs to be clear communication to teachers, staff, students and parents, about the corrective measures that would be adopted in the school.

Children are, in reality, more in need of assistance and guidance than punishment.[55] Children must therefore have access to student bodies, be encouraged to participate in *Bal Sabhas,*[56] be advised to use the Child

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53 Id.

54 Available at https://www.hrw.org/reports/1999/kenya/Kenya999-05.htmlast accessed on 19/1/2019

55 Supra. note 19.

56 *Bal Sabhas* are forums in which children may voice their concerns, opinions and suggestions in the presence of representatives from various authorities, including the Department of Education. Available at http://gscpcr.goa.gov.in/uploads/legislation/Guidelines%20for%20the%20Child%20Commitees%20to%20be%20c

Helpline number[57] for the redressal of their grievances, which they may face in the course of learning at school.

Finally, there is a need for the State to ensure that every school strictly complies with the direction that prohibits corporal punishment in the teaching-learning environment.

As late Dr. Nelson Mandela has aptly put it, "We owe our children – the most vulnerable citizens in any society – a life free from violence and fear."

onstituted%20at%20the%20village%20and%20municipal%20level%20under%20the%20Goa%20Children's%20Act.pdf last accessed on 1/2/2019 .

[57] Tele Helpline -1098.

THE MYTH OF LEGAL PROTECTION OF WOMEN WORKERS IN THE CONSTRUCTION SECTOR; AN ANALYSIS OF THE LANDMARK JUDICIAL DEVELOPMENTS

Dr. Sapna S*

Introduction

The twenty-first century has a major challenge to confront in the form of gender-related issues but what takes the cake is the sphere of the informal sector which is known for its feminization as it is the largest employer of women workforce. Quantitatively though this is a positive signal, the good points end here as going further, it is a road of insecurity, discrimination in pay, marginalization in low level/unskilled job, absence of basic facilities like maternity leave or child care, sexual harassment, inter-state migration issues et. al. which the women go through as a 'norm' of the occupation. One such informal sector which deserves special attention and focused Study from a gender perspective in the construction industry as it has the largest female workforce participation next to the agriculture sector in India and ironically suffers immense gender disparities. There is enough literature which speaks about the feminization of labour in the construction sector and provides a comparison of how the Indian female labour force in this sector is on the rise when compared to other nations. According to the National Convention of Working Women in Construction Industry in India Report, 2007, an estimate of about 36 lakh women are employed.[1] A research which studied a comparative analysis of women construction workers in India and USA points out to the feminization in this sector and states that India has the largest number of women workers in the construction sector as compared with any other economies in the world. The same article cites while there could be an estimate of 20 million women in the construction sector in India, in US the numbers are 200,000 and in European Union, it is estimated at 100,000 (EUROSTAT, 2015). Taking a statistical study for a thirty year period (1980-2010), there appears a clear indication that, while there was no increase in access for women in the USA, while in India, the increase in numbers was by

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[1] National Convention of Working Women in Construction Industry in India Report, 2007, available at, https://www.cwfigs.org/images/pdf/ national_ convention.pdf

500 per cent in this sector. Further, the literature on feminization of labour draws a strong link to marginalization of women in exploitative work situations. An elaboration of this is found in a study by Standing (1999) who spoke about a pattern called 'women jobs' which means women become the choice for employers *simply* because of feminine attitudinal traits which bear the stereotypical characters like, the willingness to work for less, *i.e.* their 'aspirational wages' are less or their non-complaining/non-agitating attitude against exploitation, a trait which is not associated with their male counterparts. The capitalist economy cashed on the features of "female" work creating a phenomenon of a strategic pool of female labour. Consequentially, the implication is a pervasive gender inequality with women being at a disadvantaged position in the labour market and the construction sites bears a glaring testimony to this fact where women are found to be clustered in low-skilled and low-paying jobs like carrying cement, sand and other materials, as helpers to the skilled carpenters and masons with no upward mobility. A study based on women construction workers in the two cities of Ahmedabad and Trivandrum revealed the high male domination prevalent in this industry which trapped the women in casual, unskilled, low wage work condition pointing to acute gender discrimination in areas of skill development, wages and upward mobility.[2] It is pertinent to note though excessive female workforce participation makes the construction industry a feminized workplace, it still remains a fully male-dominated workplace. The patriarchy manifests to a working mode where women join this sector because her husband is employed here left with little option to take any other employment.[3] For the rural folk, this is a like a family business where women are not only employed along with their husband and family members as full-time workers but are also responsible for childcare, household chores, food preparation, fuel and water procurement etc. majorly living on construction sites in makeshift arrangements. An averment made in the case of *Labourers Work [Ng On Salal* v. *State Of Jammu & Kashmir And Others* (2 March

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[2] Krishna Kakad (Program Officer) (2002) Gender Discrimination in the Construction Industry: The Case of Two Cities in India, Gender, Technology and Development, 6:3, 355-372, DOI: 10.1080/09718524.2002.11910051

[3] Almost 65percent of the women work as construction laborers since their families are already in the workforce or male members of their family are employed there by Shruti Choudhari, "Women Workforce In The Male-Dominated Construction Industry In India", Business World, (February, 2019) available at, http://www.businessworld.in/article/Women-Workforce-In-The-Male-Dominated-Construction-Industry-In-India/09-02-2019-167009/, last accessed on 3/5/2020

1983) calls for attention as it discloses the pathetic state of inter-state migrant workers who are shepherded to work in Government projects. It was alleged that sub-contractors also is known as piece-wagers who bring inter-state migrant workers to work on construction sites do not provide them with basic facilities like canteen, sanitation, drinking water or safe child care leading to stark violations of legal protections. From a gender perspective, it becomes important to understand these abuses and violations impact men and women in different ways. For a woman, it means an amplified adverse effect as childcare, food responsibility and water procurement are the gender stereotypical roles which she needs to take on additionally though the same burdens generally don't get attached to a man in a society like ours which follows rigid gender roles. The construction site is further characterized by issues of high-risk working conditions, causal and temporary nature of employment, sub-contracting, inter-state migration issues and nomadic nature of work which is need-based. Thronged with security hazards and sexual harassment at the workplace by the supervisors, women construction workers are left in a most vulnerable state.

Construction Workers Federation of India (CWFI), in its Conclusion of the 1st All India Working Women Sub-Committee Meeting, held on 2.6.2008 at Calicut, Kerala put up an IX Charter plan which interalia demanded equal, implementation of Maternity Benefit Act, 1961 in projects works, the constitution of 'Complains Committee' to be formed at District Level to Prevent Sexual, Physical, Mental harassment, skill development training, better financial aid to women working in the construction industry through Welfare Board etc. Six years later, in Construction Workers' Federation of India - 8th National Conference 2014, same demands were reiterated as nothing had changed with respect to implementation and it was vehemently emphasized that there are 'special demands' of women working in construction industry considering the distinct nature of this workplace like-the ability to work *only* to up-to a maximum of 55 years given the strenuous nature of job which required government's attention towards an early pension, financial assistance through the State's Welfare Schemes for gender-related issues like maternity, miscarriage or abortion which is commonplace again due to the nature of work and equal pay as differential pay is a widespread evil in this sector across all States. The same Report of 2014 made a finding that the position of the majority of construction women is that of sole bread earners either because they are widows, abandoned by their husband or the prevalence of alcoholism in their male counterparts which makes it imperative for a sensitized action plan by the State Governments. A Forbes research

finding reveals that women are many times employed more as a part of the family work unit, than as individuals and hence go without any direct payment.[4]

According to Martha Chen of the global network, for women in informal employment, the condition of the migrants is more pathetic because they take additional issues like; lack of their own community comfort, except a few other workers in the vicinity and absence of community support system especially child care. Another study points out that, migration follows a gendered pattern where women belonging to the lower castes and ethnic minority groups are found to be confronted with increasing work burdens, loss of support, and in the face of limited resources, enhancing the vulnerability. This bleak picture directly reflects how women work in squalid conditions in this sector facing high levels of marginalization and vulnerability to risks and stresses which is allowed to be permeated by official apathy glaringly evidenced by the deregulation prevalent in this industry. Lack of effective trade unionization due to fragmented, scattered nature of labour force where a majority of workers are inter-state migrant workers makes violations easier and unquestioned. This apart, the construction industry, by its very nature, is known for its dependence on the external market and therefore highly volatile. Economic downslide means the workers lose their jobs, they will need to move from project to project and the jobs are seasonal. However, for people who have no other alternative arrangement either to secure a job in the organized sector or set up their own business, in spite of all the risks and hazards of the construction industry, it still remains a source of livelihood. They take up this job only because they have no other option and being the most vulnerable class, they become an easy target for abuses and exploitation.

This paper analyzes the issue of protection of construction workers, particularly women, by building on the judicial pronouncements to understand the development of law in this area since its enforcement in 1996. The entire paper uses a gender analysis framework to bring an understanding of the existing gender roles in the construction sector and using these gender considerations for policy engagements. This perspective strongly roots its argument in the economic rationale of investment in women as much as in men so that the insights can comfortably be used by organizations and those in decision-making positions without the apprehension of additional cost

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[4] Forbes Insights: Diversity & Inclusion: Unlocking global potential: Global Diversity Rankings by Country, Sector and Occupation, Jan. 2012.

implications. For this, the Paper utilizes feminist research orientation to build on the 'women's experiences' in the construction industry. Primarily the paper relies on an additional premise that the construction workers suffer from lack of access to formal information as observed in the case of Peoples Union For Democratic Rights v. Union Of India & Ors, 20th September 2012 which makes them unaware of their rights and therefore more vulnerable setting the pattern of a 'norm' of such violations. The most important contribution of this research will be to engage the Labour Department to involve in more visible commitment to gender equality by dissemination of formal information regarding the workers' rights and their entitlements under the law to emphasize the imperative of access to formal information as the basis for meeting the efficiency/equity goal.

I. Informality of the Construction Industry & Feminization of Labour: The Contextual Background

Basically, the informal sector in general parlance can be understood to mean a sector that does not come within the ambit of tax liability, nor does it take the benefit of protection of the major labour laws. Workers have no basic benefits, for instance, on a comparative note, the factory workers are entitled to welfare provisions like canteen facilities, crèche, toilets or social security which the construction workers do not have. The informality in the sense of dilution of labour laws, inadequate implementation and blatant violations makes the construction workplace a haven for the exploitation of the most vulnerable. The workers being unorganized in the cohesive sense due to the migrant and transitory nature of the employment are unable to unionize and therefore articulate their rights. Section 2 (l) of the *Unorganized Workers Social Security Act, 2008* defines an unorganized sector as production or service-oriented enterprise owned by individuals or self-employed workers (one who is not working for an employer and is engaged in an unorganized sector job earning an income below a threshold or owning land below a notified limit) and if workers are employed, then the total number of workers cannot exceed ten.

According to the international definitions, this sector has the following typical features;

a) Private un-incorporated enterprise.
b) Employment size is below a certain threshold.
c) Not registered under any legislation

The informality is defined to due to the existence of a few distinct characteristics in a sector like;

a) Beyond the scope of labour legislation
b) Non-applicability of Income Tax
c) No social protection or social security
d) No basic employment entitlement like- advance notice of dismissal, severances of pay, paid annual or sick leave.

Going by definitions, different organizations in India have been using different parameters to define the unorganized sector according to the specific needs of each organization. The National Sample Survey Organization (NSSO) categorizes all manufacturing units not included under the Annual Survey of Industries as unorganized sector for the purpose of various surveys. In case of services, enterprises which are not included under the government or public sector are considered under the unorganized sector. In the compilation of National Accounts, the term unorganized sector is used differently as consisting of residual industries not covered in the organized sector. The organized sector is defined on the basis of availability of production statistics on a regular basis. The Directorate General of Employment and Training (DGET) has identified organizations employing ten persons or more as organized sector.

In the case of informal workers as distinct from the informal sector, they have been defined as;

> "Informal workers consist of those working in the informal sector or household, excluding regular workers with social security benefits provided by the employers and workers in the formal sector without any employment and social security benefits provided by the employers".

The aforesaid working definitions which describe as to what constitutes 'unorganized' or 'informal' workplace laid bare the exclusions this sector is thronged with. By simple implication, the exclusions which are in the form of inadequate basic securities, absence of labour law protection and lack of concerted union to voice their rights have led to a workplace which is totally devoid of a 'decent-work' concept. Goal 8 of United Nation's Sustainable Development Goals (SDGs) - speaks of recognition and respect for workers' rights especially for poor and disadvantaged workers, social protection permitting safe working conditions, access to fair compensation for loss of income and access to quality medical care and social dialogue to build cohesive societies as pillars of Decent Work and Economic Growth. From the aforesaid, it is now clear that construction industry is that sphere of

employment which is devoid of the decent work conceptualization where women tend to suffer more than their male counterparts and pushed into deeper vulnerabilities as compared to other informal sectors. These exploitative labour practices impact women additionally who bears the brunt of the absence of - support system, child care, bad accommodation, absence\unhygienic toilet facilities, absence/unhealthy drinking water, polluted work environment, dangerous occupational hazards on-site, gender pay-gap. Women who have to bring their children to work in construction sites which are dirty & polluted have to take risk/responsibility of the child's ill-health, infant mortality is commonplace, girls are also more likely than boys to be provided with less food during times of food scarcity - thus making them more susceptible to malnutrition and diseases- particularly young mothers and feeding mothers, no awareness on nutritional health and discriminated pay irrespective of similar work. In the case of single women, the vulnerability could take extreme forms like sexual violence or other kind of harassment. In numerous cases, the married women suffer domestic violence, husband's alcoholism and bigamous marriages of the husband, which put the responsibility back on the women to take care of the family. In her effort to manage the family, she borrows money from moneylenders by paying exorbitant interest leading to debt bondage and bonded labour. This creates a vicious circle of poverty-exploitation-poverty. Age, poverty, migration and marginalization intersect with gender to enhance vulnerability for women.

The women workers face tremendous structural constraints in this sector. Neither increasing levels of economic development nor a plethora of welfare labour legislation would mean women's empowerment automatically. There is a need for collaborative and focused efforts that make their needs a priority (Kabeer and Natali, 2013; ILO, 2016b). There is also a need for an integrated policy approach through sustainability transformations.

II. Methodology

The Study has encompassed both Primary and Secondary sources of data. For the Primary data collection in this research, both the qualitative as well as quantitative methods have been used.

Qualitative method is the most appropriate method to unearth the experiences of the respondents, particularly in the Focus Group Discussion and in-depth interviews. The analysis places reliance on the lived experiences of women workers in the construction industry specifically and women in

informal sectors generally for a comparative analysis. 120 women workers working in the informal sector of which, 67 women were working in the construction industry were interviewed.

The quantitative data were collected by a structured questionnaire administered orally to workers in the informal sector in South Bangalore. The research area was chosen for accessibility purposes as meeting with informal workers could be possible only in late evenings after 7 pm when they would return from work or on Sundays. A cross-sectional Survey of 170 informal workers participated in the quantitative data collection and was asked through a structured questionnaire on many outcomes: education level, marital status, their state, age, work they do, wages they earn, the difference in wages between men & women, other conditions of work *etc.*

The Study revolves around the research questions designed to elicit information from the respondents about their work in the construction industry. The focus of enquiry was to understand;

- Whether the pattern in the construction industry calls for a more concrete framework of safety and security measures by the employer specifically from the standpoint of women employees?
- Whether woman employees experience certain difficulties/ gender-specific discrimination because of the fact that she's a woman while men in the same position do not so experience?

These questions help to analyse the gap between legal protection on paper and in practice.

The snowball technique is an important technique of non-probability sampling and albeit the fact that it suffers from the non-representational trait, this technique is still used in circumstances where it is not feasible to reach the respondents. The Study has used this technique to collect data from the Labour Department, Government of Karnataka. In this method, the researcher used the existing contacts and used their referrals to connect with potential participants, particularly persons in authority.

Selected judicial pronouncements relating to Contract Labour-Regulation and Abolition, Minimum Wages Act, 1948, the Building and Other Construction Workers (Regulation of Employment and Conditions of Service) Act and Construction Workers' Welfare Cess has been researched to comprehensively understand the legislative intent with which the Act was

enacted in the first place, the specific cases relating to the construction industry, the judicial process which led to the ratio in a specific case and finally the judgment. Understood from a prism of gender, the aim of this Study is to help active policy engagement in the area of construction industry specifically relating to women workers.

This primary data is supplemented by the texts of various conventions of ILO, the Indian Constitutional provisions and the Labour legislations relating to the *Contract Labour (Regulation and Abolition) Act, 1970*, the *Minimum Wages Act, 1948*, the *Building and Other Construction Workers (Regulation of Employment and Conditions of Service) Act, 1996*, the *Building and Other Construction Workers' Welfare Cess Act, 1996.*

III. A Perusal of the Judicial Developments as related to the Construction Sector:

a) Interpretation of the Building and Other Construction Workers (Regulation of Employment and Conditions of Service) Act, 1996, (herein reffered as 'BOCW') and Cess Act.

- *Tata Projects Limited* v. *Union Of India* on 18th November, 2016 & *In Lanco Anpara Power Ltd* v. *State Of Uttar Pradesh,* (2016) 10 SCC 329,

  A pertinent question arose for consideration that whether the construction workers engaged in the construction of building undertaken by the appellants which is to be used ultimately as factory, would stand excluded from the provisions of BOCW Act and Welfare Cess Act as well?

It was held, that the 'superior purpose' contained in the BOCW Act and Welfare Cess Act needs special attention as both the Factories Act and BOCW Act/Welfare Cess Act are welfare legislations. The concept of 'felt necessity' was explained to mean that the BOCW Act, was enacted to take care of a particular necessity, *i.e.* welfare of unorganized labour class involved in construction activity which needs to be achieved and not discarded. It was further clarified that construction workers are not covered by the Factories Act in the instance case as "factory" means an establishment where the manufacturing process is carried on with or without the aid of power and this operation would become a prerequisite. In the same hue, the Factories Act would cover only those workers who are engaged in the said manufacturing. Therefore, it was held that welfare measures specifically provided for such workers under the BOCW Act and Welfare Cess Act cannot be denied.

- *National Campaign Committee for Central Legislation on Construction Labour (NCC-CL)* v. *Union of India & Ors.* W.P. (C) No.318 of 2006 decided by the Supreme Court in 2018.

In this case, it was alleged that neither the State Governments nor UTA had implemented at least the minimum and basic requirements of the BOCW Act even after a decade of the enactment. This case brought to light the following gaps;

- No State Government had still come up with a State Advisory Committee under Section 4 of the BOCW Act which was needed to advise the State Government on matters relating to the administration of the BOCW Act.
- Statutory rules in terms of Section 62 of the BOCW Act for registration of a beneficiary (construction worker) were not framed which defeated the very purpose for which this welfare legislation was enacted because, without registration, the construction worker could not avail the benefits under the BOCW Act.
- In 2009 the Court observed the appointment of gazetted officers as registering officers and registration of establishments was the need of the hour under Section 7 of the BOCW Act, to facilitate the implementation of other laws such as the provisions of the Maternity Benefits Act, 1961 and the provisions of the Minimum Wages Act, 1948.
- Another neglected implementation was the constitution of the State Building and Other Construction Workers' Welfare Board under Section 18 of the BOCW Act which is empowered to perform a big role relating to welfare benefits of the workers like providing financial assistance in case of accidents, providing loans etc.
- Huge amounts available with the Welfare Boards were lying unutilized.

In 2011, the Court initiated proceedings for contempt of Court and issued Directions in 2012 to audit funds lying with the Welfare Boards to shed light on the possibility of diversion of funds. In 2015 the learned Amicus Curiae highlighted the shocking state of non-utilization of funds of funds and even more unfortunate was that, the State Governments and UTAs had no clue on how to spend the cess that had been collected; on the contrary, it appeared that the cess collected was being used for purposes other than for the benefit of construction workers, such as for advertisements etc.

Consequentially, in the process of these proceedings, the Ministry of Labour and Employment submitted certain positive steps contemplated by the Government of India;

(i) Introduction of a Universal Access Number for every construction worker and this to majorly benefit a migrant worker to take full benefit.

(ii) Registration of construction workers – it was put on record that registrations had been done only of about 1.5 crores as against more than four crores construction workers.

(iii) Benefits of Government schemes such as scholarships, skill development programs for construction workers.

The Court issued directions for the following;

i. Strengthen the registration machinery, both for the registration of establishments as well as registration of construction workers.
ii. Establish and strengthen the machinery for the collection of cess.
iii. Frame one composite Model Scheme for the benefit of construction workers in consultation with all stakeholders, including NGOs who are actually working at the grassroots level with construction workers.
iv. Conduct a social audit on the implementation of the BOCW for effective and meaningful implementation of the BOCW Act.

- *Prabhakara Reddy and Company v. State of Madhya Pradesh*.[(2016) 1 SCC 600]

The emphasis, in this case, was on registering the construction workers and providing them necessary benefits. Since the levy of Cess is a fee, it was urged that urgent steps should be taken for implementation of the two Acts. Such beneficial measures for the welfare of the workers are applicable even to the construction activity which may have commenced before coming into force of the BOCW Act and the Cess Act, if they are subsequently covered by the provisions of these Acts.

b) Payment of compensation in case of injury at workplace

- *Balla Mallamma* v. *Registrar, Osmania University, Hyderabad and Anr*, [2001(2)T.A.C.182(AP)]

In this case, Osmania University, Hyderabad engaged a contractor for whitewashing and painting the walls of the University. In the course of this work, a worker employed by the contractor fell and died. The university's objection to assume responsibility to pay compensation for the death was that whitewashing the walls of the University would not be an activity to be construed as an activity for the purposes of trade and business of the

University as per section 12. The Division Bench categorically held as the Act was enforced for the expeditious grant of compensation in the event of such accidents, a hyper-technical interpretation of the statute would not only defeat the purpose of the said Act but would be adding insult to injury. Hence the University as the principal employer had to take the responsibility of payment of compensation.

- *Delhi Development Authority* v. *Raju @ Maya Ben, (2014) 143 DRJ 612,*

An electrician appointed by a contractor in a high rise building fell down and suffered 100% disability. The Court upheld the compensation awarded against the principal by applying Section 12 of the Employees Compensation Act. The Court clarified that, under section 12 of the Act, the liability rests on two persons namely the parent employer (who employed him) and the principal (for whom the employee works on the directions of parent employee). And under Section 12 of the Act, the injured worker becomes entitled to claim compensation from the principal, although not directly employed by him. The right given under Section 12 of the Act is only an alternative right and an employee can also sue his parent employer.

c) Inter-State Migrant Workmen (Regulation of Employment and Conditions of Service) Act, 1979

- *People's Union For Democratic ...* v. *Union Of India & Others on 18 September, 1982*

In this case, the Union of India in its affidavit admitted that though the minimum wage was paid to the jamadars (middlemen) who were the recruiters of these workers, the middlemen paid the workers after deduction of their commission due to which the remuneration was below the minimum wage. This case brought to light the flagrant violation of the *Equal Remuneration Act, 1976, Employment of Children Act, 1938*, *Contract Labour (Regulation and Abolition) Act 1970* and *Inter State Migrant Workmen (Regulation of Employment and Conditions of Service) Act 1979* which created the most exploitative and hazardous conditions for the workers more so for women who were exploited with lower pay. The Court held that the Union of India, the Delhi Administration and the Delhi Development Authority cannot pass the buck with respect to their legal duty to ensure observance of labour laws by the contractors and if this compliance is not met by the contractors, the workmen would clearly have a cause of action against the Union of India, the Delhi Administration and the Delhi Development Authority.

The cases aforesaid need to be studied not just for the *ratio decidendi* of the case but what also needs equal consideration are the averments which sheds light on the factual conditions which necessitated the petition in the first instance, the arguments advanced and the totality of the processes during the case which led to the ratio. It is clear from the factual matrix of the cases that, shocking official apathy exists, implementation has been inadequate and the most dangerous state of affairs is the non-availability of accurate data regarding the violations and people who are supposed to be its beneficiaries.

IV. Survey findings:

As detailed in the methodology, in-depth interview and Focus Group Discussion was used to collect data. The sample size is depicted in table-1

TABLE -1

Total number of respondents = 170

Addl Labour Commissioner, Dept of Labour & Director of Labour Institute	Dr. Manjunath	Interview
Women Construction workers	67	In-depth interview through unstructured questionnaire
Women in other informal sector	53	Interview through structured questionnaire
Men in construction sector	50	Interview through structured questionnaire
Labour Lawyer	Mrs. ShriBhoomi Yashasvini, Partner, Kasturi Advocates.	Interview
Streesakthi sangha	Ms. Padma Streesangha JP Nagar 7th phase, nataraja layout	Interview

Addl Labour Commissioner, Dept of Labour & Director of Labour Institute	*Women Construction workers*	*Women in other informal sector*	*Men in construction sector*	*Labour Lawyer*	*Streesakthi sangha*
A COMPARISON OF THE FINDINGS					
Inspectors are over-burdened The New Code will repeal the BOCW & Cess Act opening a Pandora's box.	At the construction sites, hazardous substances are present in various construction materials, such as paints, solvents, wood preservatives etc. Dangers of unfenced wells, open wires, dangerous heights and so on. Unattended children of the workers at the site	Domestic Female workers, self-employed, cleaners have a less polluted workplace Sometimes women take their children to their place of work, they	Same problem applies Women take burden of child care. So, men hardly had anything to say about	A telephonic interview was conducted. As a labour lawyer who is practicing for more than 10 years said the following were the few issues in this sector; 1. Differential pay between	

	face many kinds of accidents which are due to absence of crèche or child care, Many construction workers are migrants from Tamil Nadu, Telangana and Andhra Pradesh. They suffer from lack of community support system. This puts the women at a greater disadvantage creating insecurity regarding safety of children who will have to be brought to workplace Young mothers face	many times receive financial support or such support in kind by their employers. This issue is slightly better here This issue is slightly better here They stay in a fixed place. Don't have to move with	this. This had no application to males This had no application to males Moving with project was a problem too. Insecu	woman & male workers. 2. Harassment of all kinds exists for women but go unreported. 3. Inadequate implementation of BOCW & Cess Act. 4. The labour code is to be tried yet.	

	health problems due to dust and pollution, unhygienic washroom. Menstruating women/girls develop many associated health issues due to menstrual unhygienic environment. Lack of potable water again affects a woman whose responsibility it is to provide food to the family. Women get burdened with added responsibility and hardly do the men engage with household chores. Safety on site	the project. Goes unreported. Prevalence may be there.	rity was prevalent but chores, availability of water etc did not seem to affect men much.		

	for a woman, harassment by the masons/supervisors is common place.				

The survey was a part of a bigger project called Consultancy Project for the Department of Labour, Government of Karnataka on capacity building of women in unorganized sector. For data collection in this survey, 300 unorganized workers were surveyed, 2 FGDs and a round table was conducted. The part of the data collected exclusively of construction women workers was used for this study.

V. The Law in Theory and in Practice: The Gaps and Lapses.

The Building and Other Construction Workers (Regulation of Employment and Conditions of Service) Act (BOCW Act) and the Construction Workers' Welfare Cess Act (Cess Act) are specifically dedicated to the construction workers while the Equal Remuneration Act, 1976, Employment of Children Act, 1938, Contract Labour (Regulation and Abolition) Act 1970 and Inter-State Migrant Workmen (Regulation of Employment and Conditions of Service) Act 1979 (ISMW Act) are other legislations which are general welfare legislation applicable to the construction sector as a part of labour regulation.

The Preamble to the BOCW Act was enacted to regulate the employment of construction workers and to provide for their safety, health and welfare while the Cess Act provides for the levy of cess on the cost of construction incurred by employers to augment the resources of the Welfare Boards constituted under the BOCW Act in 1996 as a measure of social welfare. The reality, however, is that, even after twenty-four years of its enforcement, the basic mandates like constituting the State Advisory Committees under section 4 to advise the State Governments in the administration of the Act, making Rules under section 62 which is needed for registration of establishments and beneficiaries (construction workers) have not been followed by the States which is admitted in the affidavits filed by the Union of India itself.

The same affidavit highlighted that as against 4.5crore construction workers only about 2 crores had registered. And out of the Rs. 37,400 crores collected for the benefit of construction workers under the Cess Act, only about Rs. 9500 crores was utilized. A more shocking revelation in the affidavit stated some State Governments had not even bothered to transfer the amount to the State Welfare Board. Further, the Welfare Boards had made substantial diversions of funds collected as cess for weird and illogical purposes like-for purchase of washing machines and laptops for construction workers who were uneducated, poor migrant workers. Huge amounts were spent for administrative purposes which amounted to the transgression of the Act, which was made with the sole aim of the welfare of the construction workers.

ISMW Act 1979 is another important law to regulate the condition of service of interstate workers. The common practice is those migrant workers are brought by an agent who hands them over to a local contractor for a commission. The licensed contractor takes them under him as employees which bring them under the ambit of Contract Labour (Regulation & Abolition) Act, 1970. This is a common circumvention of law where the majority of the contract workmen are in reality migrant workmen depriving them with benefits under ISNM Act, for instance, the displacement allowance at the time of his recruitment and the journey fare under Section 14 & 15 of the ISMW Act.

A matrix is published by the labour Department in its website gives labour reforms undertaken by the governments state wise. A few pertinent indicators need special attention as the State of Karnataka is conspicuous by its absence.

a. Contract Labour Act – The contractors operating in Karnataka who employ less than 20 workmen as contract labour, will not be required to register/obtain a license under the Act. This threshold is increased in other States though in Karnataka, no such reform has taken place. Such a reform would be significant for small scale operations and outsourced workforce.
b. The concept of Deemed registration IN ISMW Act is an important labour reform to avoid red-tapism where an establishment is deemed to be registered if the registering officer fails to register an employer within the time prescribed by the appropriate government. This is present in many States though Karnataka has not introduced it.
c. BOCW Act- Contravention of any rules regarding the safety and health of the building and other construction workers, is punishable with

imprisonment up to three months, or with fine up to two thousand rupees or with both. Continuing contravention with enhanced fine and imprisonment is made in other states but not in Karnataka. The same is the case for violation of the Equal Remuneration Act too in Karnataka.

Conclusion

Construction industry is a major player in the informal sector with an estimate of 74 million construction workers across the country according to the National Sample Survey Organization (2016-17). What completes the picture is its characteristic migrants, women, child labour, economic and socially backward, illiterate and unskilled labour. Fragmentation and transitional nature of the job is an additional feature which acts to the disadvantage of the workers in the establishment of Trade Unions which has allowed blatant violations. All these factors collated together to create a pathetic class of people who live in total oblivion of the legal protections that they have a right to or the lawful benefits that should accrue to them. More dangerous is the complacence with which they accept the exploitation as a norm of their life. It is a fact that this industry suffers from glaring official apathy in terms of repeated violations and utter non-conviction of their commitment in the implementation in pursuance of the objective of workers welfare but what is more appalling is that this is left unquestioned due to total lack of awareness on the part of the workers. If registration is the sine-qua-non for availing benefits under the labour laws, the workers are not even aware that registration has to be done in the first place and that, registration may significantly provide a lot of welfare measures like-maternity benefit, disability claims, education to children etc. from the other side, neither has the State taken this up seriously to effectively implement registration process which is an elementary step towards the benefits. The legislations envisage Inspectors to inspect the construction sites to check the implementation of laws. Sadly, the Inspectors are over-burdened with Court prosecutions and hearing to devote much time to be on-site as per the insight given by Sribhoomi, the Senior labour Lawyer. In the entire rigmarole, the women workers are the worst hit taking multiple risks and burdens. They continue to be the most vulnerable; bearing the adverse gendered impact of an inherently hazardous industry and institutional patriarchy which permeates deep. Women in leadership position specifically in the construction industry are a rarity and this could also be the reason for the absence of understanding gendered nuances of this industry. Maternity benefit, sick leave in case of gender-

related medical issues like menstruation, abortion or post-delivery, canteen, separate toilets for women, zero tolerance for sexual or any hostility, child care like a mobile crèche are basic human rights which a woman require for decent work and make a living with dignity. Creating awareness of these legal rights and protections should be the bounden duty of the State. Drawing a corollary, for example, Sexual Harassment of Women (Prevention, Prohibition & Redressal) Act, 2013 enjoins a legal obligation on the employer to prevent sexual harassment at workplace through sensitization and awareness violation of which leads to sanctions.

In the midst of all these, a new Labour Code on Social Security and Welfare by the Government of India is in the pipeline which seeks to replace the BOCW Act and Cess Act. It is predicted by the new Code, there could be a closure of 37 State and UTs BOCW boards and workers will need to re-register all over again. Moreover, the cess collected for the sole benefit of the construction workers will go into the general basket of a social assistance fund. It may be too early to comment, but the road further surely does not look smooth. A concerted action in consultation with all the stakeholders and taking aid of technology is definitely the need of the hour.

LAW RELATING TO CONSERVATION AND MANAGEMENT OF FOREST RESOURCES IN INDIA: AN ANALYTICAL VIEW

Dr. Aneesh V. Pillai*

Introduction

Forests provide a house for a large number and variety of plants, birds, animals and other living creatures ranging from micro-organisms to human beings and are vital for maintaining the ecological balance. In ancient times, the forest provided shelter to human beings and also various produces for their survival. During those days, most part of the forests were considered as sacred and was treated with respect and reverence. With the development of modern society, the attitude towards forests were also changed and is slowly becomes a target for exploiting resources for the need and greed of human beings. This has posed a serious threat to the forests and as a result, the countries where compelled to develop legal frameworks for the conservation and management of their forests. India is blessed with diverse types of forests, including moist tropical forest, dry tropical forest, montane temperate forest, montane subtropical forest and Alpine forest[1].

The population explosion, land requirement for cultivation, urbanization and industrialization, etc., has led to large scale deforestation in the country. There has been an increase in India's forest over the last one decade due to various conservation strategies and projects[2]. However, the loss of natural forest is irreparable as the natural forest are the result of the century-old process and hence it has several ecological and other significance. Realizing the need for conserving the original century-old forests, the Indian Government has developed several legal frameworks and policies. This paper is an attempt to examine those legal frameworks with a view to identify the scope and significance of such frameworks for the management and conservation of forests in India.

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1 See for more, http://frienvis.nic.in/KidsCentre/Types-of-Indian-Forest_1811.aspx, visited on 2. 05.2019

2 See for more, The India State of Forest Report, 2015 available at https://scroll.in/article/809286/in-just-30-years-india-has-lost-large-forests-to-23716-industrial-projects, visited on 2. 05.2019.

Forest: Need for a Definition

The term 'forest' is very common in most parts of the world, yet there is no precise and universally accepted definition for the same. In India also the term forest is used in different legislations, yet a comprehensive definition that covers all the attributes of the forest is lacking. According to the Oxford English Dictionary, forests means, 'an extensive tract of land covered with trees and undergrowth, sometimes intermingled with pasture (improper names also a district formerly forest but now cultivated); and the trees growing in such a tract.'[3] The most widely used definition for the term 'forest' is provided by Food and Agriculture Organisation, as "land with tree crown cover (or equivalent stocking level) of more than 10 percent and area of more than 0.5 hectares. The trees should be able to reach a minimum height of 5 meters at maturity in situ"[4]. As per this definition, a forest is an area covered with trees primarily. The World Rainforest Movement defines forest as, "a complex web of interaction between a large variety of plants and animals as well as forest and forest-dependent peoples"[5].

The chief legislation which provides the legal framework for the conservation and management of forests in India such as Indian Forest Act, 1927; The Forest (Conservation) Act, 1980 and Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006 are does not provide a definition for 'forest.' These legislations define the major concepts associated with forests such as like forest produce[6], reserved forest[7], village forest[8], protected forest[9], non-forest purpose[10], and forest land[11]. Thus

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3 See for more, http://awsassets.wwfindia.org/downloads/course_i__block_2.pdf, visited on 2. 05.2019.

4 See, Forest Resource Management, available at http://www.fao.org/3/y2328e/y2328e25.htm, visited on 2. 05.2019.

5 The World Rainforest Movement (WRM) is an international initiative that aims to contribute to struggles, reflections and political actions of forest-dependent peoples, indigenous, peasants and other communities in the global South. See for more, https://wrm.org.uy/browse-by-subject/tree-plantations/forest-definition/ visited on 2. 05.2019.

6 Section 2(4) of Indian Forest Act, 1927

7 Chapter II of Indian Forest Act, 1927

8 Chapter III of Indian Forest Act, 1927

9 Chapter IV of Indian Forest Act, 1927

10 Section2 explanation of Forest Conservation Act, 1980

11 Section 2(d) of Forest Rights Act, 2006

it can be seen that in India also there is no single legal definition for the term forest. In the absence of a statutory definition, the Indian judiciary, in its judgment in T.N. Godavarman Thirumulpad v. Union of India and others,[12] observed that "the word 'forest' must be understood according to its dictionary meaning. This description covers all statutorily recognized forests, whether designated as reserved, protected or otherwise for the purpose of Section 2(i) of the Forest Conservation Act." In the absence of a clear understanding, the definition of 'forest' has posed several challenges to the Indian judiciary while dealing with the chief forest legislations.

The need for a comprehensive definition for the term 'forest' was also realised by the Ministry of Environment and Forest (MoEF), Government of India. As a result, in 2007, MoEF has awarded a consultancy work to Ashoka Trust for Research in Ecology and the Environment (ATREE) for developing an Indian definition for the forest in tune with India's international commitments and the interpretations provided by the judiciary in various cases. After several rounds of negotiations and consultations, ATREE proposed a definition for 'forest' as "An area under Government control notified or recorded as forests under any Act for the conservation and management of ecological and biological resources." The explanation appended to this definition states that "Such forests will include areas with trees, scrubland, grasslands, wetlands, water bodies, deserts, glaciers, geomorphic features or any other area that is necessary to maintain ecological security." The definition given by ATREE is widely discussed and it is criticized in several accounts[13].

The Parliamentary Standing Committee on Science & Technology, Environment & Forests in its 324th Report on the status of forests in India points out that the definition given by the Supreme Court in the case of Godavarman Thirumulpad is being considered as the appropriate definition by MoEF. Moreover, the MoEF has stated that "since the various legal issues related to forests are being adequately addressed by the Indian Forest Act, 1927, Forest (Conservation) Act, 1980 and related orders of Hon'ble Supreme Court, Ministry is not facing any difficulty for want of a definition of the

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[12] (1997) 2 SCC 267.

[13] See, "Meaning of 'forest' set to change in India", available at https://www.down toearth.org.in/coverage/meaning -of-forest-set-to-change-in-india-6052, visited on 2. 05.2019.

forest at present"[14]. It is to be noted here that, since the management and conservation measures are always linked with the concept of the forest, it is imperative to have a comprehensive definition for the forest.

Forest: Conservation and Management

Natural forests are a boon for the living creatures. These forests have enormous potential, like providing various resources such as timber, house for different plant and other living species, natural resources and ecological balance, etc. These forests are vital for the prosperity and sustainability of human beings and other living creatures. Though the forests are renewable resources but it takes several years to attain the essential attributes of a forest. In India, the recent report of the Forest Survey of India shows an increase in the total forest cover in the country[15], however, there is widespread destruction in the century-old natural forests[16]. Parliamentary Standing Committee points out that, "Rising demand for rapid economic growth has often come at the expense of the environment, especially forests. Forests have borne the brunt of unsustainable development practices. Pressure on forests and forest lands have grown manifold due to the demands of industry and agriculture alike. Various natural and mineral resources are found within forest areas, further increasing the pressure on forests". Therefore considering the importance and need, forests are to be carefully natured and conserved. The role of the legal framework in protecting, managing and preserving such forests is very crucial.

Legal and Policy Frameworks: An Appraisal

Forests occupied a very prominent place in the life of people in India from very ancient time onwards. This fact can be found in the Vedic tradition, which proclaims that a village is complete only if there is a forest in its vicinity[17]. So also several trees, shrubs and forests were treated as sacred and hence they were protected and persevered with outmost respect during that

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[14] See for more, https://www.downtoearth.org.in/news/forests/-sir-if-we-define-forests-it-could-create-many-loopholes--63494, 2. 05.2019.

[15] See for more,https://pib.gov.in/PressReleseDetailm.aspx? PRID=1597987#:~:text=Shri%20Javadekar%20told%20that%20in,geographical%20area%20of%20the% 20country.&text=The%20Environment%20Minister% 20further%20said,an%20increase%20of%205%2C188%20sq. visited on 30. 12.2019.

[16] See for more, https://scroll.in/article/809286/in-just-30-years-india-has-lost-large-forests-to-23716-industrial-projects visited on 2. 05.2019.

[17] See for more, M B Kumar, "Forestry in Ancient India: Some Literary Evidences on Productive and Protective Aspects", Asian –Agri History, 12(4) 2008, 299-306.

time[18]. Even today, such areas are being preserved in their natural conditions, though the area is reduced to a large extent and is facing several threats for its maintenance[19]. The history of scientific management of forests in India starts with the issuance of the Charter of Indian Forestry by Lord Dalhousie in 1855. This document is considered as the first official documents which outlined the objectives and principles of forest conservation in India. Subsequently, in 1865, the Indian Forest Act, the first legislation for the management and conservation of forest, was enacted. Though this Act is considered as a measure for the protection of the forest, it was intended to establish the State's monopoly power over the forest and to use forest as a source of revenue.

Further, this Act was replaced in the Indian Forest Act, 1878. The major highlights of this 1878 legislation were it introduced the classification of forests into **reserved forests, protected forests and village forests.** Also, it provides provisions for the regulation of the collection of forest produce and declared certain types of activities in the forests are offences. Subsequently, in order to strengthen the management of forest, a provincial forest service was established with a view to recruit and develop a cadre of forest officers in 1891[20]. Further, in 1894 a formal Forest Policy was adopted by the British Government with the aim of management of forests for the well-being of the country. In continuation of this Policy, the Indian Forest Act, 1927, was enacted by replacing the 1878 legislation. After independence, the Indian Government has taken several measures for the conservation and management of forests, such as the adoption of National Forest Policies and several legislations. At present, those legislations together with the Indian Forest Act, 1927, provides the legal framework for conservation and management of forest in India. The most important legislative and policy frameworks are as follows:

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[18] Sayan Bhattacharya, "Forest and Biodiversity Conservation in Ancient Indian Culture: A Review Based on Old Texts and Archaeological Evidences", International Letters of Social and Humanistic Sciences 30 (2014) 35-46.

[19] Mahdhav Gadgil & V.D. Vartak, "Sacred Groves in Maharashtra: An Inventory", in S.K. Jain (ed), *Glimpses of Indian Ethnobotan*y, Oxford University Press, Bombay, 1981.

[20] See,"Conservation of Forests", available at http://smitamitra.tripod.com/id5.html#:~:text=A%20'Charter%20of%20Indian%20Forests,then%20Superintendent%20of%20Forests%2C%20Burma.&text=The%20British%20then%20turned%20to,of%20scientific%20and%20systematized%20forestry, visited on 2. 05.2019.

Constitutional Provisions

The farmers of the Indian Constitution didn't foreseen the importance of the environment in general. Hence, they haven't incorporated any provisions relating to the environment or forest under Part III or Part IV of the Constitution. So also, the subject of 'Forest' was placed under the State List[21] in the Seventh Schedule. As a result, the task of management and conservation of forest was become the duty and power of individual States and they have used the provisions of Indian Forest Act, 1927 for this purpose and has adopted their own regulations. In realizing the need for protection of the environment and also due to the influence of international developments in the direction of the environment, the Indian Government has introduced 42nd Amendment in 1976. This Amendment has placed the subject of 'Forest and Wildlife' in the Concurrent List of Seventh Schedule of the Constitution[22]. This change has made in recognition of the national importance of conservation and management of forest in India. So also this Amendment has introduced two provisions, one in the Directive Principle of State Policy, *i.e.,* Article 48A and other as a Fundamental Duty, i.e. 51A(g) for the conservation and management of forests.

Article 48A imposes an obligation to the State to take various measures for the protection and conservation of forests. The Article 51A (g) imposes a duty to all citizens in the country to protect and improve the natural environment, including forests, lakes, rivers and wildlife and to have compassion for living creatures. Though these provisions are non-justiciable, these provisions act as a base for the government action for the management and conservation of forests in the country. So also these provisions are invoked by the Indian judiciary in several judgments for the protection and conservation of forests in the country[23]. The Hon'ble Supreme Court, while discussing Article 48A & 51A (g) in Rural Litigation and Entitlement Kendra v. State of Uttar Pradesh, observed the importance of forest in the following words, "Forests hold up the mountains, cushion the rains and they discipline the rivers and control the floods. They sustain the springs; they break the winds; they foster the bulks; they keep the air cool and clean. Forests also prevent erosion by wind and water and preserve the carpet of the soil".

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21 See, Entry 19

22 See, Entry 17A

23 Nature Lovers Movement v. State of Kerala and Ors. AIR 2000 Ker 131; Alim v. State of Uttarakhand & Others, W.P.PIL No. 126 of 2014; Mohammad Akhtar v State of Bihar and Ors. 1996 (1) BLJR 234.

Further, the Indian judiciary, through its activist role based on Articles 48A & 51A (g) enlarged the scope of fundamental rights under Article 21 and thereby indirectly made these Articles justiciable. Such an attempt can be seen in the case of Virendra Gaur and Ors. v. State of Haryana and Ors[24] wherein the Hon'ble Supreme Court held that "Enjoyment of life and its attainment including their right to life with human dignity encompasses within its ambit, the protection and preservation of environment, ecological balance free from pollution of air and water, sanitation without which life cannot be enjoyed. Any contra acts or actions would cause environmental pollution. Environmental, ecological, air, water, pollution, etc. should be regarded as amounting to a violation of Article 21". Thus it can be seen that, the Constitution of India, being the supreme law of the land, provides ample powers to the State and judiciary to take measures for the management and conservation of forests in the country.

The Indian Forest Act, 1927

This Act, though enacted by British Government is the major guiding legislative framework for the protection and management of forest in the country. The major purposes of this Act was to consolidate all those laws relating to forest enacted prior to 1920; to regulate the transit of forest produce; and to deal with the duty leviable on timber and other forest-produce. Though this Acct is the chief legislative instrument for the protection of forest, it didn't define the term forest rather classifies forest into three categories. The first category is a reserved forest. As per Section 3 of the Act, "the State Government may constitute any forest-land or waste-land which is the property of Government, or over which the Government has proprietary rights, or to the whole or any part of the forest-produce of which the Government is entitled as a reserved forest".

The Second category is village forests. As per Section 28, "the State Government may assign to any village-community the rights of Government to or over any land which has been constituted a reserved forest and may cancel such assignment. All forests so assigned shall be called village-forests". Further, the third category is protected forest, which is provided in Section 29. As per this provision, "the State Government may, by notification in the Official Gazette, declare the provisions of this Chapter applicable to any forest-land or waste-land which, is not included in a reserved forest but which is the property of Government, or over which the Government has

[24] (1994) 6 SCR 78

proprietary rights, or to the whole or any part of the forest produce of which the Government is entitled. The forest-land and waste-lands comprised in any such notification shall be called a protected forest".

The Act provides detailed procedures for the declaration of their three categories of forests and also provides the provisions relating to the regulation of various activities in such forests with a view to protect and conserve such forests.[25] Further, the Act provides provisions relating to the regulation of private forests and lands; levy of duty on timber and forest produce[26]; the control of timber and other forest produces[27]; and the collection of drift and stranded timber[28]. This Act is considered as a tool for re-emphasizing the State's authority over the forests and wastelands in India. Hence, the Act is criticized as a measure for ensuring the economic value of forests by way of protecting the forest for timber production rather than upholding the value of biodiversity and ecological significance of forests. Another major lacuna in this legislation was the Act is silent about the aspect of protection of fauna in the forest. Further, the Act does not provide adequate recognition to the rights of forest dwellers though they were residing in the forest for many years. The need for modernizing the Indian Forest Act was suggested by several experts and as a result, in 2019 Central Government was made an attempt to amend this legislation. However, on account of several criticisms against the proposed amendment, it was subsequently canceled[29].

The Forest Conservation Act, 1980

The issue of ecological imbalance due to large scale deforestation was the primary reason for the enactment of FCA. The enactment of this legislation was facilitated by the changes introduced by the 42nd Constitutional Amendment Act in 1976. Being legislation which is primarily enacted for the protection of the forest, it imposed restriction on the use of forest land and forest produce. The FCA declares that "State Governments are not entitled to go for de-reservation of forests or use of forest land for non-

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[25] See, Chapter II: Reserved Forests; Chapter III: Village-Forests; Chapter IV: Protected Forests

[26] Chapter VI

[27] Chapter VII

[28] Chapter VIII

[29] Jacob Koshy, "Centre drops plan to bring in changes to Forest Act of 1927", available at https://www.thehindu.com/news/national/centre-drops-plan-to-bring-in-changes-to-forest-act-of 1927/article29986437.ece, visited on 2. 05.2019.

forest purposes without permission from the Central Government. While dealing with the coverage of FCA, in T.N. Godavarman Thirumulpad v. Union of India, the Hon'ble Supreme Court has observed, "The provisions enacted in the Forest Conservation Act, 1980 for the conservation of forests and the matters connected therewith must apply clearly to all forests so understood irrespective of the ownership or classification thereof". Thus FCA is applicable to all types of forest, which are statutorily recognized as well as understood by the dictionary meaning.

The FCA, though it contains only five Sections, is considered as watershed legislation of extreme importance in the conservation of forests in India. This is because some of them conferring the credit of the slow rate of deforestation in India to this legislation, as it provides a shield to the State Governments to withstand political pressures for dealing with several activities in the forest[30]. However, on account of several reasons, this Act has not succeeded fully in achieving its object of prevention of deforestation. Most importantly, the Act does not contain any provision to prohibit any act in forest as such for the conservation of forests. In the absence of such a provision, an unbridled power is conferred with Central Government as they can authorize any activity in the forest. Though the Act provides a provision for the creation of an Advisory Committee for the purpose of advising the Governments for the grant of approval, the Committee's recommendations are purely advisory in nature. Further, there is an alarming need for protecting the century-old natural forest. However, the Act is silent about the conservation of forest in its natural state rather, it indirectly allows the conversion of such forest for non-forest use subject to the Central Government's approval. This Act does not provide provisions for public participation, in the absence of effective public support, the Act may not rise up to the expected level. Thus the Act is merely centralizing the power to the Central Government to deal with forest land without much scope for the conservation of such forests.

Scheduled Tribes and Other Traditional Forest Dwellers (Recognition and Forest Rights) Act, 2006

The tribal and other traditional forest dwellers in the forest have played a great role in conserving the forests since ancient times. Their vast knowledge about the forests and wildlife can help to preserve flora and fauna

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[30] Mr. Videh Upadhyay, "Forest Conservation Laws and Policies", available at http://awsassets.wwf india.org/ downloads/lecture_notes_session_9_1.pdf visited on 2. 05.2019.

and other natural resources. Moreover, no one can look after the forest and natural resources better than tribal and other traditional forest dwellers because their survival and identity depend on it. However, the approach of the Indian legal framework even after independence has not changed and continued the same colonial legacy of state authority over the forest and alienation of tribal people. In 1999, the Ministry of Tribal Affairs was established by the Central Government as an independent ministry with an aim to ensure more focused attention towards the interests of tribal communities. Subsequently, in 2006 the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act[31] was enacted.

The major purpose of this Act is "to recognize and vest the forest rights and occupation in forest land in forest-dwelling Scheduled Tribes and other traditional forest dwellers who have been residing in such forests for generations but whose rights could not be recorded." So also "to provide for a framework for recording the forest rights so vested and the nature of evidence required for such recognition and vesting in respect of forest land." Thus the Forest Rights Act, for the first time, gave substantive community rights to tribal and other traditional forest dwellers. Primarily the Forest Rights Act recognizes three kinds of rights: individual rights such as occupation and cultivation; community rights such as grazing, fuelwood collection, fishing, ownership and disposal of non-timber forest produce, among others; and the rights to protect, regenerate, conserve and manage community forest resource (CFR) areas. Thus it can be seen that the Forest Rights Act aims to recognize people's ownership and land-use rights at the individual and community level and, at the same time, to integrate conservation[32].

The Forest Rights Act is considered as a significant step forward for the conservation of forests and related natural resources in India. At the same time, the provisions of this Act are controversial and has raised several criticisms. The major argument is that, this Act is enacted for the purpose of distribution of forest lands to tribals and other forest dwellers by legalizing the illegal encroachments. Further, it is argued that, for the effective conservation of forest, such forest areas should be made inviolable from human beings. However, FRA facilitates the conferring of rights to forest dwellers in such

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[31] Hereinafter Forest Rights Act.

[32] Ursula Münster, Suma Vishnudas, "In the Jungle of Law Adivasi Rights and Implementation of Forest Rights Act in Kerala", 2012, XLVII (9), Economic & Political Weekly, 38.

areas expect in critical wildlife habitat. Since the primary aim of this legislation is to remedy the historical injustice committed against the forest dwellers, the provisions are taking care of their interest rather than focusing on the protection and conservation of forest.

Wildlife Protection Act, 1972

The protection and conservation of wild animals, birds and plant species are very essential for maintaining environmental and ecological security. The subject of 'Wildlife' was in the State List, but considering the requests from 11 State Governments and the need for protection of wildlife, the Central Government has adopted the *Wildlife Protection Act, 1972*. Subsequently, through the 42nd Amendment Act, 1972, this subject was placed in the Concurrent List and as a result, the Central Government has conferred with more powers to deal with this subject. This Act is comprehensive legislation for the protection of flora and fauna and it establishes a network of protected areas, i.e., National Parks and Sanctuaries. By the end of May 2020, 105 national parks[33] and 543 sanctuaries[34] were established in India. The Act seeks to establish National Board of Wildlife, State Boards and the appointment of several officers like Director of Wild Life Preservation, Chief Wild Life Warden, Wild Life Wardens and Honorary Wild Warden, etc. This Act specifically prohibits hunting of wild animals,[35] specifies several plants for protection[36] and also regulates illicit trade in wildlife and related products[37]. So also, the Act provides a list of animals, birds and plants in its Schedule.

Protection and conservation of wildlife are mainly centered on protecting and preserving the different wildlife animals, birds and plant species in a healthy condition and its habitat. A healthy forest is a basic requirement for ensuring a wide population of these species and their natural habitat. Hence, any attempt to conserve wildlife also includes the conservation of forests. The Wildlife Protection Act, 1972 is considered as an important measure for the conservation of wildlife in the country, however, the Act is

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[33] See, "List of National Parks of India", https://en.wikipedia.org/wiki/List_of_national_parks_of_India visited on 2. 12.2019.

[34] See, "List of Wild Life Sanctuaries", https://en.wikipedia.org/wiki/List_of_wildlife_sanctuaries_of_India visited on 2. 12.2019.

[35] Chapter III: Hunting of Wild Animals

[36] Chapter IIIA: Protection of Specified Plants

[37] Chapter V: Trade or Commerce in Wild Animals, Animal Articles and Trophies.

being criticized on account of its poor implementation and related other concerns.[38]

The Biological Diversity Act, 2002

Biodiversity is an umbrella term that covers all forms of life on earth, including the different plants, animals, micro-organisms, the genes they contain and the ecosystem they form. This biodiversity plays an important role in the life of human beings. It fulfills the need for food, fibre, fodder, cloth, fuel, timber and medicines. It also helps agriculture, forestry, fisheries, water purification, climate regulation, erosion control and nutrient cycling. India occupies only 2.5% of the land area of the world community but is a home for 7.8% of the globally recorded species, thus India is one of the 12-mega diverse countries of the world[39]. In 1992, India enacted the Biological Diversity Act, thereby incorporated obligations under the International Convention on Biological Diversity (CBD), 1992 into the Indian legal system.

Biological Diversity Act provides provisions for the conservation of biological diversity, ensuring sustainable use of its components, and also ensuring the fair and equitable sharing of the benefits arising out of the use of biological resources and knowledge. For this purpose, the Act provides for the establishment of National Biodiversity Authority at the National level, State Biodiversity Boards at different States and Biodiversity Management Committees at the local level. Forest is a home for a large amount of bio-diversity and is responsible for its maintenance. However, the Biological Diversity Act does not lays any special emphasis on forest biodiversity. Though this Act was a result of various consultations among different stakeholders, it is criticized on different grounds. The major criticisms are focussing on the aspect, this Act is for the conservation of biodiversity, but it gives emphasizes its commercial exploitation rather than conservation. So also this Act is criticized on account of various provisions dealing with bi-piracy, intellectual property, the effectiveness of mechanisms established under the Act, etc.

Along with the above specific forest legislations, there are several legislations which may also have an impact on the protection and

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[38] Akash S. Karmakar, "The Lacunae in Wildlife Protection Laws in India", available at http://www.elaw.in/ forest/wildlife/lacunaewildlife-Akash.pdf; visited on 2. 05.2019.

[39] Benny Joseph, *Environmental Studies*, Tata McGraw Hill, New Delhi, 2009, p.108.

conservation of forest in India. The most important among them are Environment Protection Act, 1986; *Water* (Prevention and Control of Pollution) *Act*, 1974; *Air* (Prevention and Control of Pollution) *Act*, 1981; Factories Act, 1948; Mines Act, 1952; Mines and Minerals (Regulation and Development) Act, 1957; Ancient Monuments and Archaeological Sites and Remains Act, 1958; Atomic Energy Act, 1962; Insecticides Act, 1968; and Panchayat (Extension to the Scheduled Areas) Act, 1996, etc. However, all these legislations are adopted with its own purposes and hence its effect on the protection and conservation of forest is very limited.

National Forest Policies

India is one of the first countries in the world who have adopted a national-level forest policy for the systematic management and conservation of forests. There are four national-level forest policies were formulated till now. The first and foremost forest policy in India was adopted in 1894. The major thrust of this policy was the management of forests of the well-being of the country. However, the major aim of this policy was not conservation and protection of forest rather, it was the realization of maximum revenue from such areas. Immediately after independence, the Indian Government has formulated the National Forest Policy, 1952. This policy was intended to respond effectively with the changes that occurred in India in connection with forest management after 1894. As per this policy, forests in Indian were classified into four categories viz. Protection Forest, National Forests, Village Forests and Tree Lands. The aim of this policy was to maintain a total one third of land area as forest[40]. One of the significant features of this policy was that it laid emphasis on the protection and preservation of wildlife and its management.

The National Commission on Agriculture 1976 points out that "national forest policy should be based on optimizing forest resources for goods and services, preventing erosion and denudation, maximizing forest productivity and augmenting employment potential for national prosperity." It suggested a change from conservation-oriented forestry to a more dynamic program of production forestry[41]. The current National Forest Policy was adopted in

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[40] See, https://www.yourarticlelibrary.comnational-forest-policy-of-india-since-independence/ 39672, visited on 2.05.2019.

[41] Mr. Videh Upadhyay, "Forest Conservation Laws and Policies", available at http://awsassets.wwfindia.org/ downloads/lecture_notes_session_9_1.pdf, visited on 2. 05.2019.

1988, which is founded on the constitutional obligations for the protection and conservation of forest in the country. The major aim of this policy was "maintenance of environmental stability through preservation and, where necessary, restoration of the ecological balance that has been adversely disturbed by serious depletion of the forests of the country."

The 1988 policy is considered as a visionary in its scope and ambition because the prime focus of this policy is environmental sustainability and maintenance of ecological balance. One of the important significance of this policy is the emphasis with respect to the active participation of people in the process of sustainable management of forests in the country. This has given rise to Joint Forest Management, which creates a relationship between local communities and villages with forest departments for the purposes of sustainable management and benefit-sharing of public forest lands[42]. In 2018 there was an attempt to formulate a new forest policy and as a result, the Central Government released the draft National Forest Policy, 2018. This draft policy aims to mitigate the issues of climate change and to deal with human-animal conflict as well as the issue of the decline of green cover. The draft is not yet finalized and once it is final, it will replace the National Forest Policy of 1988.[43]

Conclusion

The protection and conservation of forest is of utmost importance in the present time as forest is a reservoir for providing various essential items for the existence of human beings and other living organisms. India is one among the few countries in the world which having a provision for the protection of forest in the Constitution itself. Even prior to the independence, the Indian Forest Act, 1927, was enacted for the protection and preservation of the forest. In the post-independent period also there are various legislations as well as policies were formulated for the management of forests in the country. From a close analysis of all those legislations and policies, it can be seen that the laws in India are capable enough to manage and conserve the forests in India.

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[42] See, http://awsassets.wwfindia.org/downloads/forest_management.pdf, visited on 2. 05.2019.

[43] See, https://www.jatinverma.org/salient-features-goals-of-national-forest-policy-1988, visited on 2.05.2019.

It is alleged that there is a problem with the effective implementation of these legislations. It can be seen that the need for developmental projects, permission to do several human activities and its necessity, and the lack of coordination among various authorities as well as conflict with different statues are the major reasons for the slow pace of implementation of these legislations. Hence, there is an urgent need to develop a proper strategy to overcome these dissident forces. So also, there is a need for developing a proper statutory definition for the term forest. Such a definition should classify forest into natural forest land and another forest land. In such old natural forests land's all sorts of activities, including developmental projects and any other human interventions, should be completely banned. It is to be noted here if these legislations and the Forest Policies where implemented in its true spirit, the aim of protection and conservation of forest can be realized.

CHILD LABOUR HAMPERED THE DEVELOPMENT OF NATION: ISSUES AND CHALLENGES ENDING CHILD LABOR IN INDIA

Dr. Janhavi S. S.*

Introduction

Children are the pride of a country. A country gain recognition and glory through them. They have an important role to play in future and may also guide the destiny of the nation along with the path of progress and achievement. But children are the most vulnerable resources of the nation and they deserve the best that mankind give. Child labour is a global phenomenon, it exists both in the developed and underdeveloped countries. Urbanization, coupled with industrialization, has thrown more and more population with the countryside to cities. The first four decades of Indian independence witnessed a significant increase in the pace of urbanization. This sort of urban growth proved obnoxious for children and they became the most vulnerable group of its ill and risks. Maltreatment of children started with the joining of children in the labour force to save parents from starvation[1]. However, children need to grow in an environment that enables them to lead a life of freedom and dignity, where opportunities for education and training are provided to grow into a worthy citizen. Every child has the right to receive the best that society can offer. Thus, unfortunately, a large proportion of children are deprived of their basic rights are found working in various sectors of the economy[2]. Regarding child labour, India occupies the top rank among the neighboring countries in the south Asian region. Most probably, the number of child workers in India is the highest in the world, in spite of the protection provided by the constitution state and central legislations child labor is still prevalent in the informal sectors of the Indian economy.

According to ILO child labour includes children prematurely leading adult lives, working long hours for low wages under conditions damaging to their health and to their physical and mental development, sometimes separate from their families, frequently deprived of meaningful education and training

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1 Debadutta Chaudhury S N Tripathy, 'Girl Child and Human Rights', Anmol Publications Pvt. Ltd. New Delhi, 2005, p-84 & 85

2 C. P Yadav, 'Policies and Legislation for children in India', Anmol Publication Pvt., Ltd, New Delhi, 2008, P-57.

opportunities that would open up for them a better future. Children work as a part of family labour or as wages earners, sometimes as migrant labour. Very often they remain invisible and in bondage. They are found in all the three sectors of the economy i.e., the agrarian, manufacturing and service sectors[3].

Definition of Child Labour

Children form a very vulnerable section of human society. They deserve to be valued, nurtured and their rights protected. Child labor means children are abandon their education when they are forced to work despite of their tender age.

Child labour is not a recent issue, but it has gained momentum with the advent and growth of human rights. International Labour Organisation, UNICEF *etc*., and the Constitution of India, many vehement Legislations and Judiciary, all together, are dedicated to protect the abuses of children in employment and exploitations there are several Indian statutory provisions, *viz,* the children (pledging of Labour) Act 1948, *The Employment of Children Act 1938*, *Factories Act 1948, the Plantation Labout Act 1951, Mines Act 1952, the Marchent Shipping Act 1958, the Motors Transport Workers Act 1951, the Beedi and Cigar Workers (Conditions) Act 1966,the Contact Labour Regulation Act 1970, the Inter-state Migrant Workmen (Regulation of Employment and Conditions of Service) Act 1986.* These Acts have restricted the hours of work, stipulated the period of rest, leave, minimum wages, protection against exploitation and fixed minimum age of employment. The word child is defined in different enactments for the purpose of the enactment as follows:

Under the *Child Labour (Prohibition and Regulation) Act, 1986* child as a person who has not completed fourteen years of age. Under the *Factories Act, 1948* and *Plantation Labour Act 1951,* a child is one who has not completed fifteen years of age. Under *Juvenile Justice (Care and Protection of Children) Act, 2000 and POCSO Act 2012* have defined the word child is a person who has not completed 18 years of age.

Under Article 12 the United Nations Convention on the Rights of the Child defines child that "the child" as "every human being below the age of 18 years unless under the law applicable to the child, majority is attained earlier". This convention expressed the commitment of the international community to provide the child with a secure future. It emphasized that the enhancement of the child's health and nutrition was the first duty of the

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[3] *Supra* note 2 at 58

nation. It is felt that improving the status of women and ensuring them equal rights with men will be an advantage for the world's children. Child labour, child abuse and child prostitutions are some of the torture that child has to bear. Child prostitution is the worst form of child labour and now there is a perceptible increase[4]. India has the largest child population in the world. The very serving of the India child is a matter of concern. Around 2.5 million children die in India every year, accounting for one in five deaths in the world and one in three malnourished children in the world gives in India.[5] India has the highest number of child labour law in the world still child labour is rampant.[6] Because existing laws on child labour that allows children to work in accusations those are not hazardous in nature.

Despite all these international and national measures against child labor, there are arguments in favor of child labor. The supporters of child labour are resistant to change and offer several arguments in favor of child labour. First, they say that if the child does not work, he/she will starve. This is not true as children can avoid starvation by working a few hours a day. But they are made to work 8 to 10 hours a day and inhuman conditions and paid half the amount paid to an adult. The second argument is that if they stopped from working, they will move to a more degrading industry-the sex industry. This again is extremely unlikely if the governments join together to ban child labour. The sex industry is not as profitable as many of the export industries where child labour in practice.

The third argument is that children have always worked in the industry of traditional handicrafts and the developed nations do not understand that these industries will die if children do not learn the skill. This again is not true because children were part of the labour force in artisanal and agricultural economics, but it was within their families and the workload allowed time for play and interaction with other children. Today, however, children work away from their families to toil in illegal factories. The small children who work inhuman conditions are more furthering the cause of traditional handicraft but are being exploited to meet international competition and demand for cheap products.[7]

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4 D.R Karthikeyan, Human Rights-Problems & Solutions, Gyan Publishing House, New Delhi, 2005,P- 96

5 Rajnish Gagnani,, 'Crime Against Chiden', Cyber Tech publications New Delhi, 2008, p-186.

6 *Ibid* at 193

7 Aadesh k Devgan, 'Crime Against Women & Child', Cyber Tech Publishing Co. New Delhi, 2005, P-8 & 9

Worst forms of Child Labour

According to a study by the ILO, the majority of the world's child labour (around 71 percent) is done in the agriculture sector. In India, children are working in the agriculture sector, including industries of the state, pencil, diamond cutting, agate cutting, gem polishing, cotton hosiery, carpet weaving, lock making, pottery, brassware, match, glass, skill and silk products, textile, knives, handcrafts, silk weaving and zari and in brick kilns. As a result, they suffer from diseases like asthma, chronic bronchitis, tuberculosis, eye defaults, stunted growth, tetanus, skin diseases and silicosis[8]. However, children in India engage in the worst forms of child labor. The commercial sexual exploitation of children is among the worst forms of child labour. In India, there are around 1.2 million children involved in prostitution.

In 1999, the International Labour Conference adopted the Worst Form of Child Labour Convention (No. 182) & Recommendations (No. 190). The convention requires the ratifying member states to take immediate and effective measures to secure the prohibition and elimination of worst forms of child labour as a matter of agency. The worst forms of child labour comprises:(a) all forms of slavery or practice of similar to slavery; (b) procuring or offering a child for prostitution or pornography; (c) using, procuring or offering a child for licit activities such as trafficking and (d) work likely to harm the health safety or morals of children[9].

In India, the Trafficking of Persons (Prevent, Protection and Rehabilitation) Bill was drafted in 2018 it was a significant effort to eliminate the worst forms of child labor which criminalizes and enhances penalties for aggravated forms of trafficking, including trafficking for the purposes of forced labor, bonded labor, and begging. Any number of legal prohibitions would not work so long as the underlying problems of poverty were not addressed. The Global convention calls for immediate & effective measure to secure the prohibition and elimination of the worst forms of child labour, as a meter of urgency. The root causes like poverty and social backwardness needs to be addressed. We should ensure that children have access to schools and their parents have jobs. The long term solution is in expanding primary education infrastructure so that poor children who are able to attend school instead of falling victim to exploitation by unscrupulous employers.[10]

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8 *Supra* note 8 at 9

9 B D Singh, ' Industrial Relations Emerging Paradigms', EXCEL Books, New Delhi, 2004 P-408

10 *Supra* note 5 at 37

The Problems of Child Labour in India

In India, according to the 2011 census, there were the total number of child labourers, aged 5–14, to be at 10.1 million, National sample survey figures that out of the total of 259.64 million children in that age group. It is difficult to cite a current figure for the number of children engaged in child labour[11]. Child labour is a source of income for poor families. A study conducted by ILO Bureau of Statistics found that "Children's work was considered essential to maintaining the economic level of households, either in the form of work for wages, of help in households' enterprises or of household shares in order to free adult household members for economic activity elsewhere. In some cases, the study found that a child's income accounted for between 34 and 37 percent of the total household income. Therefore, child labourers income is important to the livelihood of the poor family. Parents would be biased into being compelled to support their decision to send their children to work, by saying that it is essential. They are probably rights for most poor families in India: alternative sources of income are close to non-existent[12].

Extremely poor families cannot send their children to school even if there are provisions of free and compulsory education. It appears that the economic factor is a critical factor associated with the child labour problem. Because of their poverty, parents cannot make any investment in their child's development; they are also reluctant even to support them. They want their children to fend for themselves as early as possible, much better off, they become a source of income to the family. So they send their children as labourers[13].

Indian Constitution and Child Labour

Article 23 of Indian Constitution prohibits trafficking in human beings and forced labour including child labour. Article 24-prohibits the children below the 14 year engaged in work in any factory or mine or engaged in any other hazardous employment. Article 21A of the Constitution of India recognizing education as a fundamental right, this constitutes a timely opportunity to use education to combat child labour in India. Under Article 21A State shall provide free and compulsory education to all children of the

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[11] D.Madhava Soma Shakaram, K. Jaishankar, S Ramdas, 'Crime Victims and Justice-An Introduction to Restorative Principles', Serials Publications, New Delhi, 2008 P-282.

[12] *Ibid* at 282& 283

[13] *Ibid* at 286

age six to 14 years. Article 39(e) and (f) directive principles of state policy provides that tender age of children are not abused and children are given opportunities and facilities to develop in a healthy manner in a condition of freedom and dignity and that childhood and youth are protected against exploitation.[14]

After independence, India trying to combat child labour. The constitution clearly states that child labour is wrong and measures should be taken to end it. Children use in the production process was anathema as per the Employment of Children Act, 1938 was very primitive law as per in this direction**.** children below the age of 14 are prohibited to work in production process under Factories Act, 1948 and the Mines Act, 1952**,** The government of India has implemented the child labour (Prohibition & Regulation) Act, 1986 Act, it sets the minimum age of employment at fourteen years as such the Act prohibits the employment of children below 14 years' age employed in the occupation listed in the schedule and also it provides to regulate the conditions of work of children in certain other employment. This Act falls short of making all child labour illegal and fails to meet the ILO guidelines concerning the minimum age of employment set at fifteen years of age[15]. The central legislature of India had promulgated a legislation Child and Adolescent Labour (Prohibition and Regulation) Act, 1986 ("CL Act") to regulate the child labour practices in India. A complete prohibition has been imposed on the employment of child labour below the age of 14 years in any establishment whether hazardous or not and a child is permitted to work only to help the family, in a family enterprise or as child artist after school hours or during vacations.

In 2009 The Right to Education Act**,** passed, instead of punishing the people who employed child labour, it provides conducive environment to provide basic education to all Indian children, after completion of basic education children become capable to enter the workforce out of choice and not compulsion. However, even after all this, child labour continues to be the norm in a lot of industries.

The *Juvenile Justice (Care and Protection) Act 2000 Act* provides for the creation of Advisory Boards and the establish of State Children Funds, whose objects is to protect the children and to provide educational, training

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14 *Supra* note 2 at 41 &42

15 Sailaja Nagendra, 'Child Development-Problems & Issues', ADB Publication, Jaipur, 2008, P-244.

and rehabilitation facilities for neglected children. In 1993, the Union government set up a National Authority to eliminate child labour and provided 850 crores which aimed to benefit two million child labours.[16] The Juvenile Justice (care and protection) Act was amended in 2015 and superseded all existing legislation, it defines a child as someone who is under age 18. The POCSO Act is a gender-neutral Act which has been enacted in 2012 to provide protection of children from sexual abuse and exploitation. The Act also prohibits child sex labor.

In India, different commissions on child labour constituted to look into the working conditions of children & made recommendations which resulted in the enactment of child labour laws. In 1929 Royal commission on child labour, in 1944 labour legislative committee (Rege Committee), in 1979 Gurupadaswamy Committee was constituted. In 1987 the National Child Labour Policy was adopted to deal with the situation where conditions of work result in their being disadvantaged and exploited[17]. It focuses more on the rehabilitation of children working in hazardous occupations and processes, rather than on prevention.

National Commission for Protection of Child Rights (NCPCR) was established with an objective to ensure that all Laws, Policies, Programmes, and Administrative Mechanisms are in consonance with the Child Rights perspective as enshrined in the Constitution of India and the UN Convention on the Rights of the Child.

PENCIL (Platform for Effective Enforcement for No Child Labour) for Child Labour it is an online portal it launched on 26 September 2017 to ensure effective enforcement of provisions of the amended Child Labour (Prohibition & Regulation) Act 1986 and smooth implementation of National Child Labour Project (NCLP) Scheme. Government of India is founding to eliminate all forms of child labour under the National Child Labour Project

Supreme Court in *M.C Metha & State of Tamil Nadu* held that working of children in Sivakasi and prevailing conditions is a gross violation of the article 24 of Indian constitution[18]. Child labour is a significant problem in India. The prevalence of it is shown by the child work participation rate, which is higher in India than in other developing countries. The major

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[16] S*upra* note 5 at 107& 108
[17] *Supra* note 2 at 48
[18] *Supra* note 2 at 51

determinant of child labour is poverty. Even though children are paid less than adult wages income, they earn is benefit to poor families. In addition to poverty, the lack of adequate and accessible source of credit forces poor parents to engage their children in the harsher form of child labour-bonded child labour. Some parents also feel that formal education is not beneficial therefore, children should learn work skills through labour at a young age.

Ending child Labour

Child labour cannot be eliminated by focusing on one determinant, for example, education or by brute enforcement of child labour laws. Before attacking child labour state should ensure that the needs of the poor are filled. If poverty is addressed, the need for child labour will automatically diminish. Development of India as a nation is being hampered by child labour[19].

A cycle of poverty is formed and the need for child labour is reborn after every generation. India needs to address the solution by tackling the underlying causes of child labour, only then will India succeed in the fight against child labour. Child labour will never be eliminated until poverty disappears[20]. Child labour persists in some countries because of lack of political will and in addition to that in India, child labour laws cannot be adequately enforced because of the shortage of qualified labour inspectors.[21]

Since the causes of child labour are complex, including poverty, economic exploitation, social values and cultural circumstances, solutions must be comprehensive and must involve the widest range of partners in each society. Some specific actions need to be taken up urgently- the government must fulfil their responsibility to make relevant primary education free and compulsory for all children and ensure that all education attend primary school on a full-time basis. Since the data on child labor is scarce national and international systems must be put in place to gather and analyze compatible data on child labour. This would ensure that the problem is addressed effectively. Special attention should be given to the forgotten or 'invisible' children working as a domestic servant on family firm.[22]. Child labour legislation must be accompanied by a wide range of measures

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19 *Supra* note 16 at 245

20 *Supra* note 16 at 273

21 S*upra* note 16 at 277

22 Aadesh k Devgan, 'Crime Against Women & Child', Cyber Tech Publishing Co. New Delhi, 2005 P-10-11

concerning employment and income generation programmes, and by a reform and expansion of educational facilities.[23]

Conclusion

Children as a class constitute the weakest, most vulnerable and defenseless section of human society, recognizing that "children are vulnerable to various forms of abuse, malnutrition, exploitation; diseases *etc.* Child labourers faced several problems. They are affected physically, mentally emotionally. The child labourers get very less wages compared to their workload. So that they are not satisfied in their work because their basic needs are not fulfilled. Fortunately, child labour may decline as incomes of our country rise. All government interventions in education are based on the assumption that child labour cannot be abolished and that the poor do not wish to send their children to school. In fact, the poor make enormous sacrifices to do just. Today, millions of Indian children are joining the labour market where they are subject to exploitation and drudgery with little hope of every realizing their dreams and aspirations. They are engaged mostly in unpaid domestic works and in the unorganized sector.

No country has successfully ended child labour without first educating its children. In India, free and compulsory primary education envisaged in the constitution as well as under the RTE Act still becomes a dream. Mere enactment of laws will not serve the purpose, society at large has to be sensitized and, like the supreme court of India other wings of the government should be actively concerned to ensure the welfare of the children. Advancement of legal commitment to end child labour. The government should promote decent work for adults and youth Government all over the world should refuge to buy products from any supplier that exploits children

[23] *Supra* note 1 at-127.

RIGHT TO SAFE FOOD IN INDIA - AN UNENDING LITANY

Dr. N. Sathish Gowda*
Sumithra. R**

Introduction

'*Food is the most primitive form of comfort'*.[1] Food[2] is the fundamental need of all living creatures. It is inevitable for the existence of life on earth, whose fulfilment could alone sustain life. As has been propounded globally, Right to Food is a basic Human Right which is not territorial in nature. However, the obligations to protect and employ the same in the municipal sphere are primarily domestic, in the relationships between respective states and their own people where the major obligations of national governments are towards the people living under their jurisdiction. However, it should be documented that the international community also has obligations to respect the basic human rights and one of them is the Right to food. Hungry person of any nationality in any part of the world is also a part of the world community and he has rights claims not only in relation to his own nation but also in relation to the world as a whole. The Human Right to adequate food will be hollow in its application if obligations to honour this Right is restricted only to one's own government or one's own state. The authors strongly observe that 'children born into poor countries are not born into a poor world'. Universality can be attributed to Human Rights in the real sense only when the international community lends a helping hand and steps into the shoes of the national government which has failed to fulfil its obligation to respect this

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1 Sheilah Graham was a British-born, nationally syndicated American columnist during Hollywood's "Golden Age".

2 Sec 3 (j) Food Safety and Standards Act 2006, Any substance, whether processed, partially processed or -unprocessed, which is intended for human consumption and includes primary food, genetically modified or engineered food or food containing such ingredients, infant food, packaged drinking water, alcoholic drink, chewing gum and any substance including water used in food during its manufacture, preparation or treatment but does not include any animal feed, live animals unless they are prepared or processed for placing on the market for human consumption, plants prior to harvesting, drugs and medicinal products, cosmetics, narcotic or psychotropic substance.

basic Right, transcending all national boundaries and does what needs to be done to assure the realization of this Right.

When India became independent, the Constitution declared it to be Socialist, Secular, Democratic Republic. The Fundamental Right under the Indian Constitution sets down that every citizen has a right to life. This has been interpreted by the highest court of the land as every citizen's right to a life in dignity, good health and free speech in fraternity of communal harmony and national integrity. These rights are possible only if people are not starving at the outset. Unless poverty is eradicated our socialist credo will remain just a pretence. Food security is one of the most important measures that should make the Indian socialist republic a reality in the true sense of the term.

In this backdrop, the authors are dismayed at the stark contrast between the prevailing harsh reality where people are still struggling for two square meals a day and an ideal situation where people enjoy the basic necessities of life including food, as contemplated by different International instruments, which prompted to undertake the reality check in light of the following issues-

- Despite there being a plethora of international instruments strengthening the 'Right to food', malnutrition still haunts the world at large and India in specific.
- There seems to be no effective mechanism in place and no firm commitment on the part of the world community with regard to the Human Right to adequate food
- Even today more than 840 million people in the world are starving for food, predominantly in developing countries[3].
- Food Security to include Food Safety also.
- When food itself has become scarce, safe and standard food is a distant mirage
- Despite, there being a legislation for food safety and standards, injury to the people due to adulterated food is on the rise
- Though food safety has become a global concern yet no major breakthrough in India

In this Research paper, an effort is made to study the background of Right to Food, its genesis, International Standards for food and its adaptability

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[3] The Committee on Economic, Social and Cultural Rights General Comment No. 12: The Right to Adequate Food (Art. 11) para 5

in the Indian context, provisions of Food Safety and Standards Act, 2006[4] and the factors responsible for failure to achieve food safety and standards in India. In the context of this paper, the word food connotes safe food which is fit for human consumption.

Genesis of the Right to Food

The historic document to identify the Right to Food in specific term was the Universal Declaration of Human Rights which provides under Art 25(1) that 'Everyone has a right to standard of living adequate for health and wellbeing of himself and his family including food, clothing, housing and medical care and necessary social services and the right to security in the event of unemployment, sickness, disability, widowhood, old age, lack of livelihood or in circumstances beyond his control'. The same thought was inculcated in the International Covenant on Economic Social and Cultural Rights 1966 (ICESCR). The state parties recognised the Right of everyone to adequate standards of living for himself and the family including adequate food, clothing & housing and to the continuous improvement of living conditions[5]. The Convention on the Rights of Child 1989[6] recognises the importance of Right to food and acknowledged the state party's broader obligation to recognise the Right of Child to adequate standard of living. Thus most of the documents which deal with adequate standards of living in fact also embody food.

The Special Rapporteur[7] on the Right to Food states that the Right to food entails the Right to have regular, permanent and uninterrupted access either directly or by means of financial purchases, to quantitatively and qualitatively adequate and sufficient food, corresponding with the cultural

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4 FSSA

5 Art 11(1), the Covenant also emphasized on the fundamental right of everyone to deal free from hunger and made it obligatory on the state parties to take measures including specific programmes both individually and through international co-operation. a. To improve methods of production, conservation and distribution of food by making full use of technical and scientific knowledge of the principle of nutrition and by developing or reforming agrarian system in such a way as to achieve the most efficient development and utilization of natural resources. B. also take into account the problems of both food importing and food exporting committees to ensure an equitable distribution of world food supplies in relation to the need.

6 Adopted by General Assembly Resolution 44/25 on 20th Nov 1989

7 Jean Ziegler, United Nations Economic and Social Council, Special Rapporteur on the Right to Food, Mission to India in 2006

tradition of the people to which a consumer belongs and which ensures a physical and mental, individual and collective, fulfilling and dignified life, free of fear[8].

In 1999, the Committee on Economic, Social and Cultural Rights(CESCR), issued its General Comment No12[9] on the Right to adequate food. This General Comment aims to identify some of the principal issues which the Committee considers to be important in relation to this Right. Currently this is the most commanding source of the Right to food under the United Nations Human Rights jurisprudence and mirrors the present status of the Right under international law. It was emphatically defined by the CESCR[10] by stating that the 'the Right to adequate food is realised when every man, woman, child, alone and in community with others, has physical and economic access at all times to adequate food and means for its procurement. The General Comment 12 can be acknowledged as one of the most relevant legal interpretation of Right to food which states that the right to food shall not be interpreted in a narrow and restricted sense which equates it with a minimum adequacy package of calories, proteins and other specific nutrients. It specifies not only adequacy of food but also access to food. Accessibility encompasses both economic & physical accessibility and emphasises more on the sustainable accessibility not only for this generation but for even future generations to come.

In 1985, The United Nations General Assembly Guidelines for Consumer Protection[11] stated that 'When formulating national policies and plans with regard to food, governments should take into account the need of all consumers for food security and should support and as far as possible adopt standards from the Food and Agriculture Organisation's and the World Health Organisation's Codex Alimentarius Commission[12]. In 1987, the Special Rapporteur to the Economic and Social Council of the UN on the Right to Food observed that 'Everyone requires food which is a) sufficient, balanced and safe to satisfy the nutritional requirement b) culturally

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8 A/HRC/7/5 para 6

9 DOC.E/C.12/1995/5 of 12th May 1999

10 General Comment 12, 1990, para6

11 A/RES/39/248,16 April 1985

12 A body that was established in early November 1961 by the Food and Agriculture Organization of the United Nations(FAO), was joined by the World Health Organization (WHO) in June 1962. Sumeet Malik's 'Handbook of Food Adulteration & safety Laws'1st Edn 2011, Eastern Book Company, Lucknow

acceptable c) accessible in a manner which does not destroy one's dignity as a human being[13]. India is a party to the ICESCR and it has also ratified other treaties relevant to the Right to Food including the ICCPR[14], the CRC[15] and CEDAW[16], which means that under its international commitment, the state is obliged to ensure the Right to food for all its people.

Right to safe food has become a global concern because of which United Nations Organisation is constantly endeavouring to secure this Right globally through various Conventions and entered into Treaties and Agreements with all its member nations. India being a member nation of the United Nations Organisation is obligated to adopt the recommendations of the conventions and to implement the obligations under the treaties and other international agreements. Article 253[17] of Indian Constitution empowers the state to make legislation for giving effect to international agreements and treaties and for adopting the spirit of the International conventions. Unless the state makes a suitable municipal legislation for adopting the International conventions or treaties or agreements, no citizen can make use of these instruments. Hence in order to give effect to various International conventions and covenants relating to Right to food, for which India is a party, Union government has enacted the Food Laws namely National Food Security Act, 2013(NFSA) and Food Safety and Standards Act, 2006(FSSA) in our country. Still, food security, which seeks to end starvation, does not abolish food adulteration, virtually all items of food in India have chemicals or adulterants added to them, which make them unsafe to various degrees[18]. Therefore every public institution where food is served must ensure that what is served is chemically safe, nutritionally healthy and makes up for the health of the nation.

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[13] 'Report on the Right to Adequate Food as a Human Right' AsbjornEide, E/CN.4?sub/1987/23/para 52

[14] The International Covenant on Civil and Political Rights is a multilateral treaty adopted by the United Nations General Assembly on 16 December 1966 and in force from 23 March 1976. Article 6.

[15] Convention on the Rights of the Child 1989 Articles 24 &27

[16] The Convention on the Elimination of all Forms of Discrimination Against Women is an international treaty adopted in 1979 Articles 12 &14

[17] 'Legislation for giving effect to international agreements'

[18] Justice V R Krishna Iyer, Former Judge, Supreme Court of India, '*Safety in food security'* ,THE HINDU Bangalore Edition 7th November 2013

India and Codex Standards

India became a member of the Codex Alimentarius Commission[19] in the year 1964 when the Prevention of Food Adulteration Act, 1955 was the legislation in India to deal with adulterated food. The object and purpose of the Act were to eliminate the dangers to human life from sale of unwholesome articles of Food. It was enacted to curb the extensive menace of food adulteration and is a legislative measure for social defence[20]. The Act suffered from many shortfalls, like, food inspectors were not trained to tackle the bane of food adulteration, did not provide for mandatory standardisation of food products, inspectors to the population ratio was absent in the Act[21], the Act failed to distinguish the different categories of adulteration[22], lack of coordination between the food inspectors and public analysts.

Erstwhile, the Indian food regulations comprised of various food laws that were enacted at different points of time under the ambit of various ministries of Government of India. Historically they were introduced to complement and supplement each other for achieving total food safety and quality. The result was that the food sector in India was governed by a number of different statutes rather than a single comprehensive enactment. The FSSA came into effect, subsuming various central Acts[23.] FSSA has laid lot of emphasis on the responsibilities of the food business operators[24] which is in the interest of the general public as it affects the public health and has laid restrictions on the advertisement and prohibition as to unfair trade practices[25]. The Act has set up a statutory Food Safety and Standards Authority of India

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19 CAC

20 Prakash C Juneja, '*Prevention of Food Adulteration Act and Consumer Protection'*, 8, Central Law Quarterly, 371 (1988)

21 Anubha Dhulia, '*laws on Food Adulteration Act : A Critical Study with Special Reference to the Food Safety and Standards Act 2006'*, ILI Law Review 168, 2010,

22 Subhash C Sharma, '*Consumer Protection'*, 8(4), Central India Law Quarterly 377, 381 (1995)

23 Prevention of Food Adulteration Act of 1954, Fruit Products Order of 1955, Meat Food Products Order of 1973, Vegetable Oil Products (Control) Order of 1947, Edible Oils Packaging (Regulation) Order of 1988, Solvent Extracted Oil, De-Oiled Meal and Edible Flour (Control) Order of 1967, Milk and Milk Products Order of 1992 and also any order issued under the Essential Commodities Act, 1955 relating to food. Yetukuri Venkateswara Rao's, 'Commentary on Food safety and Standards Act 2006', Asia Law House, Hyderabad. (2011)

24 FSSA Sec 26

25 *Ibid* Section 24

(FSSAI) for laying down science based standards for articles of food and to regulate their manufacture, storage, distribution, sale, import to ensure availability of wholesome food for human consumption. The Act has established a single reference point, FSSAI for all matters relating to food safety and standards by moving from multi level, multi department control to a single line of command. Ministry of Health and Family Welfare is the administrative machinery for the implementation of the Act.

Thus setting of science based standards is the most important objective of the Act. The Act adopts the 'Food Safety Management System' which includes the adoption of Good manufacturing practices, Good hygienic practices, Hazard Analysis and Critical Control Point and such other practices as may be specified by the regulation for the food business[26]. It is the responsibility of the food business operator to ensure that articles of food comply with the requirements of the Act at all stages of production[27]. The manufactures, packers, wholesalers, distributors and sellers shall be liable for such article if they do not meet the standards set by the Act[28]. The Act imposes the responsibility on the food business operator to recall the articles of food if they do not satisfy the required standards of the Act[29]. If the Designated officer has reasonable ground for believing that a food business operator has failed to comply with any regulations under this Act, he may serve an improvement notice on the food business operator requiring him to[30] take certain measures necessary within the period mentioned in the notice. If a food business operator has been convicted of an offence under this Act and if the court feels that there is a health risk with respect to the food business, Prohibition order may be imposed on him[31]. The Food Safety Officer has been conferred with several powers and on any misuse of the same by him makes him liable too, to a penalty of Rs 1 lakh[32].

Thus, India has an obligation to provide its people with food and articles of food which are devoid of anything that is detrimental to their health. The Act has set standards for food which make them fit for human consumption. The Act clearly demonstrates that no article of food can contain

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26 *Ibid* Section 3(10) (s)
27 *Ibid* Section 26
28 *Ibid.* Section 27
29 *Ibid* Section 28
30 *Ibid* section 32
31 *Ibid* Section 33
32 *Ibid* Section 39

any food additive or processing aid unless it is in accordance with the provisions of the Act. Further, no article of food should contain any contaminant, naturally occurring toxic substances or toxins or hormone or heavy metals in excess of such quantities as specified by regulation. The food should also not contain residues of insecticides or pesticides or veterinary drugs or antibiotics, solvent residues, pharmacological active substance and micro-biological counts in excess of tolerance limits prescribed by the Act.

For carrying out the various responsibilities under the Act, a huge infrastructure with large paraphernalia has been elaborated under the Act. The Food Authority must establish Scientific panels on food additives, pesticides and antibiotic residues, genetically modified organisms and food, contaminants in the food chain, biological hazards, labelling and method of sampling and analysis. Food laboratories established by the Central or State Government are accredited by the National Accreditation Board for testing and calibration laboratories and these must be recognised by the Food Authority. The Act also mandates for a food safety audit which involves a systematic and functionally independent examination of food safety measures adopted by manufacturing units is made to determine whether such measures and related results meet the objective of food safety. The Act has also constituted Scientific committees, Central Advisory Committee, appointed Food Safety Officers, Food Analysts. Chapter IX of the Act deals with various offences and the penalties elaborately.

FSSAI under the Ministry of Health and Family Welfare has been designated as the nodal point for liaison with the CAC. One of the commonly known parameters of Codex standards is residues of unwanted or harmful agrochemicals used in various stages of production such as Maximum Residue Levels of Pesticides. The other one is the presence of unwanted microbes as was the case with Indian mangoes. The 28 member European Union temporarily banned the import of Alphonso mangoes and four other vegetables from India from May 1st 2014 owing to the contamination by pests such as fruit flies and other quarantine pests. The National Codex Contact Point[33] has been constituted by the FSSAI for liaisoning with the CAC and to coordinate Codex activities in India and its most important function is to act as a link between the Codex Secretariat, National Codex Committee[34] and

[33] NCCP
[34] NCC

Shadow Committee[35]; coordinate all relevant Codex activities within India, receive all Codex final texts regarding standards, codes of practice, guidelines and other advisory texts and working documents of Codex sessions and ensure that these are circulated to those concerned. The NCC has to advise the government on the implications of various food standardisations, food quality, food issues which have arisen and related to the work undertaken by the CAC so that national economic interest is considered when international standards are discussed.

Implementation Fall out of the FSSA

Food regulation anywhere in the world is a difficult and challenging task. Food regulation is expected to be a facilitator for the industry, but very often they both are at loggerheads. The FSSA is very impressive and ambitious in its object but the implementation though may not be impossible yet is a colossal task and fraught with many challenges. The following quoted incidents demonstrate the failure of the Act.

- Few countries rejected milk produced from Kolar district from Karnataka due to fluoride content above the permissible limit[36] but we were oblivious of this contamination and consumed it.
- Karnataka State Human Rights Commission issued a notice on January 30th to Labour Commissioner seeking his response to the complaint that 60 employees in one of the garment factories in Bangalore fell ill after consuming contaminated water[37]. The Commission took notice of the media reports and issued a notice suo-moto.
- In a crackdown on the food adulteration, the south zone police at Charminar at Hyderabad raided two milk adulteration units and apprehended two persons. They mixed skimmed milk powder with milk powder of inferior quality.[38]
- On March 8th 2017, three children aged between 14&15yrs died hours after consuming the food for dinner at a hostel run by a residential school[39]. The

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35 Shadow Committees will work under the NCC. The Food Authority has appointed the Shadow Committees of the NCC on subject matters corresponding to the Codex Committees to assist the NCC in the study or consideration of technical matters.

36 Deccan Herald, Bangalore Edition dated July 18, 2017, '*High fluoride content: Milk exported from Kolar rejected'*.

37 Deccan Herald, Bangalore Edition dated January 1, 2014, '*KSHRC issues notice'*

38 m.timesofindia.com/city/Hyderabad accessed on January 4th at around 10.00pm

39 Deccan Herald, Bangalore Edition dated March 11, 2017

students died, hours after they complained that the sambar served during dinner was bitter.

- As many as 14 students took ill after consuming lunch at the SC/ST student's hostel at Yadgiri, a place at Karnataka on 10th March 2017.[40] These students complained that the contaminated water used to cook the food had resulted in the incident.
- A news paper reported that stale food was served in Rajdhani Express, one of the most prestigious trains run by our railways[41]. The passengers complained that the food served for dinner was stale and that bad smell emanated from food packets. If this is the scenario in state owned enterprise, one can imagine the scenario at hotels and other motels.
- A total of 60 students took ill after having the mid-day meals provided to them at government higher primary school at Benakatti in Bagalkot District[42]. One of the students complained that she found a lizard in the sambar, after rice and sambar were served to them and soon the students started vomiting.
- The National Human Rights Commission suo-moto issued a notice to food regulator FSSAI over reports of pesticides being found in food items more than the prescribed limit[43]. In its notice, NHRC directed FSSAI to submit its reply within eight weeks from the date of receipt of notice. Maximum Residual Levels of pesticides in fruits and vegetables and other food products have been fixed under the Food Safety and Standards (Contamination, Toxins and Residues) Regulation, 2011. Presence of pesticides residues beyond these levels in food products including food, vegetables and meat is treated as a violation of the said regulations, which attracts penal action under the Act.
- A pregnant woman discovered a dead lizard in her French fries at a fast food outlet in Kolkata[44]. These instances are not lone instances but only a few which saw the light of the day, many such instances go unreported owing to so many reasons.

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40 *Ibid*

41 Deccan Herald, Bangalore Edition dated 29th March 2017

42 Deccan Herald, Bangalore Edition dated 15th March 2017

43 http://economictimes.indiatimes.com/industry/cons-products/food/nhrc-notice-to-fssai-over-reports-on-pesticides-in-food-items accessed on 3rd April 2017 at around 8.20pm

44 ' *When health is at stake'* Deccan Herald, Bangalore Edition dated 5th April 2017.

- Ninety five students fell ill after consuming midday meal, in which a lizard was found, at Gaddikeri Government High School on December 12th 2018[45].
- On 14th December 2018, 12 devotees were killed and another 70 devotees fell ill and were admitted to hospitals after consuming prasada at the temple in Chamarajanagar[46]. The death toll rose to 15.
- On 20/12/2018, over 100 children fell ill after consuming their midday meal in separate incidents in Ballari and Bagalkot districts[47].
- On 31/12/2018, over 100 kids became ill after consuming food in which they had spotted a lizard[48].
- This is in continuation of the above mentioned incident, where the children living at the government run Balamandira, Siddapura complained that they are used to seeing the worse stuff in their food. Stones and worms are routinely served along with rice and sambar[49].
- On January 26th 2019, two women died after consuming temple prasada in Chintamani in Chikkaballapur district[50].

These instances are not the only incidents of fall out of FSSA, but only a few which saw the light of the day; many such instances go unreported owing to so many reasons. All these instances go unheeded and also raise a question if state owned enterprises are exempt from the purview of the Act. In spite of the Act being in place for more than a decade, we are not able to prevent deaths and injuries caused due to unsafe food. At this juncture the authors are sceptical about the effective implementation of the Act and has thus undertaken to study the difficulties involved in the implementation of the Act.

Challenges Faced in the Implementation of FSSA

- In India, food industry is of different sizes such as the organised sector, small scale and unorganised sectors, though the small scale sector and domestic market in itself is quite large. The requisites of standards in each sector are different. The food chain is infested with various stake holders ranging from a small farmer to street vendors to retailers to the big

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45 *Ibid* '*Lizard in midday meal, 95 students fall ill',* dated 13th December 2018

46 *Ibid 'Poison-laced 'prasada' kills 12 at temple',* dated 15th December 2018

47 *Ibid* '*Over 100 kids ill after eating midday m*eal', dated 21st December 2018

48 *Ibid* '*Lizard in dinner:Over 100 kids ill*', dated 1st January 2019

49 *Ibid* '*What is on the menu? Anna sambar, worms and stones'*, dated 2nd January 2019.

50 *Ibid* '*2 women die after eating prasada, 10 in hospital*' dated 27th January 2019.

industrialists. The protocol for standardisation of food articles should keep in mind the actual users of these standards, environment, the culture and the present infrastructure of the country which seems to have been overlooked by the legislators.

- The major stumbling block for the implementation of the Act is the population of India which is 127,42,39,769, and is 17.25 per cent of the global population[51] and accounts for a third of the world's poor as remarked by the World Bank[52] earlier this year. When one third of the people are living below poverty line, access to food in itself is a major challenge and the concept of 'food safety' is a far cry. The cascading effect of poverty is illiteracy because of which not many people are aware of FSSA, 2006. Though, this Act was enacted in 2006, a decade ago, till today consumer awareness about this legislation in urban areas is very poor and nil among ruralites. People came to know about the existence of this Act only after the Maggi noodles incident which took place in June 2015, thanks to maggi noodles being the staple of the urbanites.
- The FSSA has used certain expressions without defining them because of which confusions galore. Expressions like 'good manufacturing practices', 'good hygienic practices' and 'Hazard Analysis and Critical Control Point' have not been defined at all. Another glaring loophole is that the Act expressly exempts the animal feed and standing crops or plants prior to harvesting[53] from its purview. It is common knowledge that pesticides, insecticides find their way into the animal feed and also into the end agricultural produce. An effort to achieve food safety must be a comprehensive endeavour. Food safety can be achieved only by initiating reforms in agricultural practice, dairy sector and poultry farmimg. The expression 'sub-standard[54]' is not well articulated and states that even if the food article does not meet the standards set by this Act, the food is still not considered unsafe. If this is the case, then there is no point in subjecting the food to test to see if they will meet the requirement under the law.
- In Europe, US and other developed countries it is mandated that only food grade lubricants and greases are to be used in plant and machinery which

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51 Jansankhya Sthirata Kosh or National Population Stabilisation Fund (NPSF) 2017

52 planningcommission.nic.in/reports/genrep/rep_hasim1701.pdf (accessed on 21/12/2014 at 8.00am)

53 Section3(1) (f) FSSA

54 FSSA Section 3(1)(zx) 'Sub-standard', an article of food shall be deemed to be sub-standard if it does not meet the specified standards but not so as to render the article of food unsafe.

manufacture, process and pack the food, drinks, water and dairy products. Industrial lubricants are manufactured using petroleum base oils and additives which generally have toxic substance which might dangerously contaminate food items causing severe health hazards. In US, to avoid this probable toxic contamination of food, only food grade lubricant like NSF[55] approved in US, are mandated by statuary bodies. In India no such regulations are mandated from Food Ministry and FSSAI, hence most plants of food process industry are using toxic industrial grade lubricants. Many smart food processing plants procure small pack of food grade lubricant to show during inspection and audits but 99% plants are using non food grade lubricants which are very toxic. The industrial lubricants are not safe to use in food processing plants because they are formulated using many toxic material having toxic ingredient while certified food grade lubricants are formulated using non toxic materials and also approved by third party like NSF stating that these products are safe for food process industry.

- The adoption of the international level standards[56] without preparing the domestic food industry will pose challenges for effective implementation of the Act. gradual and steady harmonisation of domestic scenario with international regulations, keeping national interests in mind is the need of the hour. The small and medium scale industries may not keep track of the regulatory changes which make it difficult for them to identify the procedural and compliance changes introduced by the Act. In line with the popular adage 'slow and steady wins the race', at the outset the government must upgrade the local set up before trying to achieve the higher targets as set out by the provisions of the FSSA. The gap between the existing system and the standards set by the Act will have to be cemented first before taking a leap. The government must realize that there is no point in setting higher targets and not able to reach them.
- Street Food hawkers in India are a major challenge in the implementation of FSSA, who are generally unaware of food regulations and have no formal training in food handling. They also lack support services such as good-quality water supply, sanitary facility and waste disposal systems, which hinder their ability to provide safe food. Although standards are specified for water to be used as an input in the processing/preparation of food, the FSSA does not specify standards for potable water, which is

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[55] National Sanitation Foundation is an independent, non-profit organization that certifies food service equipment and ensures it is designed and constructed in a way that promotes food safety. NSF is internationally recognized.

[56] Codex Standards

usually provided by local authorities. Thus, the food providers have to shoulder the responsibility of ensuring that clean water is used, even when tap water may not meet the required safety standards. This is a tall order for small food enterprises and street food vendors.

- Costs also rise if each vendor invests in water purification systems. If such facilities were provided to food vendors by the state authorities as it happens in Malaysia and Singapore, India might be more successful in ensuring that this sector also maintains acceptable standards of hygiene and cleanliness. In a survey conducted by the Maharashtra government health department in 2006 it was shown that up to 20-25% of household food expenditure is incurred outside the home and some sections of the population depend entirely on street foods. This is one of the consequences of rapid urbanization, with millions of people having no access to kitchen or other cooking facilities. There are millions of single workers without families and a large floating population who move in and out of the city for various purposes. These people largely depend on street foods for their daily sustenance from places of work, hospitals, railway stations and bus terminals. The food at these shanties are generally prepared and sold under unhygienic conditions, with limited access to safe water, sanitary services and garbage disposal facilities. Hence street foods pose a high risk of food poisoning due to microbial contamination, as well as improper use of food additives, adulteration and environmental contamination.
- An important CAC guidelines for food processing companies is to follow a food quality management system called Hazard Analysis and Critical Control Points(HACCP). Most of the countries have adopted this Codex Alimentarius Commission's guidelines, but unfortunately in India FSSAI has not been successful in ensuring that all food processing industries follow this guide line.
- The Tiffin suppliers who are popularly known as Dabbawalas in Mumbai[57], how will the same food safety laws be applied to them. If

[57] A dabbawala is a person in Mumbai, India, whose job is carrying and delivering freshly-made food from home in lunch boxes to office workers. They are formally known as MTBSA (Mumbai Tiffin Box Suppliers Association), but most people refer to them as the dabbawalas. The dabbawalas originated when India was under British rule. Since many British people who came to India did not like the local food, a service was set up to bring lunch to their offices straight from their home. The 100-odd dabbas (or lunch boxes) of those days were carried around in horse-drawn trams and delivered in the Fort area, which housed important offices. Today, businessmen in modern Mumbai use this service and have become the main customers of the dabbawalas. In fact, the 5,000-strong workforce (there are a handful of women) is so well-known that Prince Charles of England paid them a

applied, the Act will restrict the manufacture and supply of economically priced food that serve millions of poor consumers and office-goers every day. The Act does not differentiate between the food products being manufactured by the agribusiness companies and the food products being sold by street hawkers and dhabas[58] that dot the national highways. "Both organised sector and unorganised sector are required to follow the same law with regard to specifications on ingredients, traceability and food recall procedures which is very difficult for unorganised sector entities like street vendors and small hawkers"[59]. While the general prescriptions and regulations spelled out by the Act, meet the requirements of the agribusiness companies, the same cannot be blindly applied to the small-time hawkers that provide cheaper food to the working class in the urban centres. These food vendors are the lifeline of economically disadvantaged people in urban areas who have no access to kitchen.

- The other challenge is the kind of materials used for storage of food. Often food articles are packed in plastic or polythene wrappers which may not be of food grade. The beverages and water packing bottles have no controls which can result in seepage of toxins into liquids and the food packed. Regulation 2.3.14(2), The Food Safety and Standards (Prohibition and Restrictions on Sales) Regulations, 2011, expressly prohibits the use of plastic articles in commercial establishments, for the purpose of sale or serving of food. Plastic articles of any form may be the plastic articles used in catering and cutlery, unless the plastic material conforms to the food grade. Even today, food establishments ranging from street hawkers to the posh restaurants have the fancy of serving the food in plastic plates and packing the food parcels using plastic sheet or plastic containers. For instance, Indira Canteens in Karnataka, is a state owned venture, feeds the people with subsidised food. At these canteens, hot food is served in

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visit during his recent trip to India. Several academic institutions regularly invite the dabbawalas' representatives for discussion, and to complement and enhance their academic content. At times, businesses find it useful to illustrate the application of how such a system uses Six Sigma principles to improve its operations. White Paper prepared by MBA Students at The University of North Carolina's Kenan-Flagler Business School. Nishesh Patel and Naveen Vedula http://mumbaidabbawala.in/(accessed on 9/2/2017 at 8.00pm)

[58] Dhaba is the name given to roadside restaurants in India and Pakistan. They are situated on highways and generally serve local cuisine. www.oxford dictionaries.com/definition/english/dhaba

[59] Ravulapti Madhavi, "Is Food Safety Lurking in The Food Safety and Standards Act 2006?", Supreme Court Journal, [8th May to 12th June, 2008], Vol 4

plastic plates though FSSAI's Regulations clearly demonstrate that plastic should not be used either in packing or serving the food, as the hot food, when it comes in contact with plastic, plastic will react & release toxins and the food will turn carcinogenic and will not be fit for human consumption. The 'charity should begin at home first'. First, the state owned ventures/enterprises should give impetus to the guidelines stipulated by FSSAI.

Suggestions for the Effective Implementation

One of the basic requirements for the effective implementation of the Act is

1. To set up fully equipped laboratories and providing trained manpower to operate them. All testing has to be conducted only in accredited laboratories as at present not all the public sector food laboratories are accredited. FSSAI commissioned a gap analysis study for up gradation of 50 food laboratories under the Central and State government. The study indicated that there is an urgent need to upgrade the infrastructure, strengthen staffing and training inputs and put in place more reliable laboratory management and operational procedure. The sub-group addressed that a network of efficient laboratories is the backbone of any credible food safety initiative.
2. Most of the existing food laboratories lack infrastructure and facilities for testing of residues, heavy metals and microbiological parameters[60].

   It is heartening to note that food testing science and technology is continuously evolving each day. The advanced and hi tech instrumentation and techniques to detect the minute levels of adulterants and undesirable substances in food articles demands sophistication right from the beginning like say, sampling and handling of sampling. With the advancement of technology, globally the legislations dealing with food have become more stringent than ever before and demanding the food industry to cope up with the thus set high standards as far as the quality of food is concerned. But lack of skilled human resource and adequate infrastructure circumvent this.
3. The FSSAI and its allied committees namely, scientific committees, scientific panels, the central advisory committee require very efficient and highly skilled staff which are hard to come by.
4. Adding fuel to fire is the changing scenario of food standards and their typical rigid requirements do not reach rural India when major portion of

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[60] Government of India, Report of the Working Group on Drugs and Food Regulation for 12th year Plan, No 2(6)2010, Planning Commission, New Delhi, May 2011 at p 41

Indian population resides in rural India. Farmers are unaware of the unhealthy inputs that should be avoided in the farming practice in the form of insecticide, pesticides and fertilisers, as it is common knowledge that whatever goes in has to manifest in the final product, if the raw material for the food processing industries are adulterated, it is imminent danger that the end product will also be laced with adulterants.

5. Though agricultural extension services are established across the country, neither they provide information about the prevailing national and international standards nor do they assist the farmers by imparting technical knowledge about changing the cultivation practices and patterns to meet these standards[61]. In order to set the standards for food, the availability of true and updated data not only on consumer related indicator but also on ingredient related indicators is crucial.
6. In one of the studies conducted by the Federation of Indian Chambers of Commerce and Industry, the interviewed respondents strongly opined that since reliable data for the consumption of food is not available, the FSSAI should be mandated to embark on a comprehensive monitoring of data relating to the levels of food additives, contaminant levels and health survey and information & data regarding the hazards in the food industry and their source must also be collected and acted upon at once[62].
7. Campaigns should be conducted by both the state and central government creating mass awareness among the people about the need for food safety which ultimately results in healthy citizenry.
8. Agriculture should be prioritised which in turn will boost the food production. Only if there is enough supply of agricultural produce in the market, we can contemplate safe food and not when we have hungry bellies to feed as it is a common scenario that poor will consume anything. As an indirect approach to this, poverty alleviation programmes should be initiated profusely to increase the living conditions.
9. Farmers should be encouraged to desist from the rampant and unscrupulous use of chemical fertilizers and the government should incentivise the farmers to employ organic farming.
10. Good interaction with the food industry while ensuring compliance as well as understanding the limitations that may exist.

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[61] Sheeba Pillai, '*RIGHT TO SAFE FOOD: LAWS AND REMEDIES'* Vol. 41, No. 2, Ban.L.J. (2012) 119-135

[62] FICCI, '*Study on Implementation of Food Safety Standards Act- An Industry Perspective',* May 2007 available at foodsafetynews.filters.wordpress.com (accessed on 9/2/2017 at 8.00pm)

11. It is not out of place to mention about the necessity to maintain cleanliness of the wash rooms in the eateries. These wash rooms are the breeding ground of bacteria and other pathogens, which can spread to even the eating place and also the kitchen, where the food is cooked. In most of the hotels, wash rooms are not kept clean. The authorities under the FSSA should not only look at the cleanliness in the kitchen but should also ensure cleanliness of the wash rooms.

Conclusion

Food adulteration is common in India. Even milk, consumed primarily by children, isn't spared. What's particularly worrying the authors is, the kind of substances employed to adulterate, including toxic chemicals. This shows that the trade off between the risk of getting caught and the 'reward' of huge profits is skewed heavily in favour of the adultrator. The government must focus on raising the risks to the adulterator. One way of doing this is by hiking the penalty, including making it analogous to attempt to murder in extreme cases. It's equally important to regularly check foodstuff for adulteration and ensure speedy trials. It is appalling that though the object of this Act is to maintain the standards for the food and make it safe for the human consumption, yet the same has remained a distant mirage. The death and injury to human beings due to contaminated or adulterated food is not a stray case, questioning the very purpose of the Act.

The struggle of a common man to ensure safe food has become a constant litany in vain. The business of making food appear appealing and attractive often spoils the quality of what we eat. To make nation healthy, every citizen must be able to buy food that is free from contamination. Food security cannot be guaranteed merely by providing a certain quantity of grain to each family but by ensuring that every grain that is distributed is wholesome and nourishing and not noxious. The ideology of food safety is a composite one beyond merely making the grain available physically. There is no point in having a legislation which has failed to give reliefs as contemplated by it. It has become only a paper tiger. The authorities established under this Act have turned out to be only white elephants and eating up a major portion of our economic resources without doing much.

MONTEVIDEO PROGRAMME: AS AN ACTION PLAN

Dr. Jyothi Vishwanath*
Sumanth H.M.**

Introduction

Since its creation UNEP had placed development of environmental law among its major activities. This was the mandate given to UNEP by the UN General Assembly resolution 2997(XXVII) and subsequent decisions of the UNEP Governing Council. During the 1970s these activities were mostly of an Ad hoc nature in response to specific requests from the Governing Council. The speedy pace of international environmental law – making in general and of the respective UNEP actions, in particular required a clear cut programmatic approach.

The United Nations Environment Programme (UNEP) acted as a catalyst in the development of International Environmental Law. At the beginning of its initiation, UNEP prepared a set of 15 draft principles on the conduct of states in the field of the environment regarding conservation and harmonious utilization of natural resources shared by two or more states.[1] These principles were prepared by the request of the U N General Assembly which called for adequate international standards for the conservation and utilization of natural resources common to two or more states. The Charter of Economic Rights and Duties of States adopted by the General Assembly also incorporated similar principles.[2] These principles were adopted by the UNEP Governing Council but it was not considered by the General Assembly. The reason for this, it did not provide a specific legal obligation under International Law, or the absence of such obligations.[3]

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1 UNEP Principles on Conservation and Harmonious Utilization of Natural Resources Shared by Two or More States (1978); for the text, see *ILM*, Vol. 17, 1978, pp.1097-99.

2 Article 3 of the Charter of Economic Rights and Duties of States (1974) provided: In the exploitation of natural resources shared by two or more countries, each state must cooperate on the basis of a system of information and prior consultation in order to achieve optimum use of such resources without causing damage to the legitimate interest of others; See *ILM*, Vol.14, 1974, p.251.

3 Bharat H Desai (2004), *Institutionalizing international Environmental Law*, New York: Transnational Publishers, p 88.

For the formulation of some general principles of International Environmental law, the Governing Council of UNEP adopted an ambitious plan for the development and periodic review of environmental law, which was prepared at an Ad hoc meeting of senior government official's expert in environmental law at Montevideo (Montevideo Programme).[4] Montevideo Programme contributed to the development of both soft law and hard law instruments in international environmental law. It became an ambitious exercise in laying down a framework, method and programme for the development of environmental law. It recognized the importance of codification and progressive development of environmental law to promote international cooperation, mutual understanding and friendly relations among states, apart from serving as an essential instrument for proper environmental management and improvement of the quality of life.

The Montevideo Programme not only established the milestones to be followed in the development of international environmental law, it also required a periodical review to determine its adequacy to current needs and to assess the result of its implementation. This would help for addition of new emerging issues in the decade and also take initiation for tackling that issue. UNEP has organized and coordinated its Environmental Law activities through a series of Ten year Programmes for the Development and Periodic Review of Environmental Law. One of the problem faced at the time of designing the programme was to anticipate the emerging issues that would need to be tackled and those issues were related to multilateral environment agreements or to other emerging issues.

In 1981, a group of senior Government Officials Expert in environmental law representing Governments from around the world met in Montevideo, and developed a long – term, strategic guidance for United Nation's Environment Programme (UNEP) in the field of Environmental Law. It was adopted by the Governing Council of UNEP in 1982 and become a UNEP long – term programme (The Montevideo Programme for the Development and Periodic Review of Environmental Law).

Process of Montevideo Programmes Adoption

The Executive Director of the United Nation's Environment Programme (UNEP) to undertake a process for the preparation of a strategic

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[4]See Report of the Ad hoc Meeting of Senior Government Officials Expert in Environmental Law, UNEP/GC 10/5/Add,2, and Corr.1.

Environmental Law Programme for UNEP. For preparation of this programme, Secretariat of the United Nation's Environment Programme (UNEP) with the assistance of a group of experts in environmental law draft a Environmental Law Programme (Montevideo Programme).

The process involves an initial consultation with environmental law experts who produce a report, followed by consideration of the report by governments, the result of that initial consultation, which leads to a negotiated document laying out priority areas for work in developing environmental law. That document is then reviewed and adopted by the UNEP Governing Council. Each Montevideo Programme is reviewed in mid- term, after five years to determine progress and to identify any new needs that may have arisen. That review produces a publicly available progress report that is presented to the Governing Council and a final progress report is also published at the end of the ten year period.

Montevideo Programmes I – III have been the basis for developing UNEP's biennial work programmes with respect to environmental law – both development of the law and implementation of law and have also served the broader environmental law community as expressions of the areas that need the most work. The increased emphasis on developing domestic environmental law and implementing environmental agreements were also presaged by the Montevideo Programme.

Importance of the Montevideo Programme

Montevideo Programme is a living document in the international environmental law. It has given a long term strategic guidance to UNEP for acting at international level for tackling various environmental issues. Montevideo Programme stressed for the conclusion of international agreements, developments of guidelines, rules and assistance to developing countries for implementation and compliance of environmental law. From 1982 to till date Montevideo Prgramme had included various subject areas which are challenging at international level. UNEP as worked according to the strategy mentioned by the Montevideo Programme and adopted various international conventions, guidelines, rules on the subject areas. The subject areas under the Montevideo Programme from the first phase to fourth phase has increased from three to twenty seven, it trace out the emerging environmental issues and discussed within. This would helpful for UNEP to take action on these issues. The Programme for the Development and Periodic review of Environmental Law is action oriented and requested the UNEP to

address substantive environmental issues. The Montevideo Programme has special focus on developing countries and countries with economies in transition at the time of implementation of subject areas and requested the UNEP to give all assistance in the form of technical co-operation, appropriate assistance in the field of institution building, education, training and information regarding environmental law to developing countries. This is helpful for the proper codification, progressive development and implementation of environmental law at the international level. Montevideo Programme also addressed the relationship of environment with other fields especially trade, military and security. This is the important step at the international level for rise environmental voice at the international forums for protection of environment. So Montevideo Programme is showing a path to UNEP for initiating actions at the international level on the subject areas. The Montevideo Programme is still surviving because from its beginning focused on national, regional and international agreements on subject areas mentioned under each Montevideo Programme.

Montevideo Programme and UNEP

Since its establishment in 1972 UNEP is active in the development of environmental law. Its involvement in the work of environmental law, however, had been determined and carried out on an Ad hoc basis. More systematic approach was needed for Governments and UNEP to address the subject from long-term perspectives with clearly defined benchmarks. Montevideo Programme has served as an important part of UNEP's initiatives for a programmatic approach to law making on sectoral environmental issues.

Under the Montevideo Programme, a number of global conventions have been developed under UNEP's auspices. These include the 1985 Vienna Convention for the Protection of the Ozone Layer[5], the 1987 Montreal Protocol on Substances that Deplete the Ozone Layer,[6] the 1989 Basel Convention on the Control of Trans-boundary Movements of Hazardous wastes and their Disposal,[7] the 1992 Convention on Biological Diversity,[8] the

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5 Convention for the Protection of the Ozone Layer (Vienna, 1985), entered into force on 22 September 1988. See *I.L.M.*, Vol, 26, 1987, p.1529.

6 Protocol on Substances that Deplete the Ozone Layer (Montreal, 1987), entered into force on 1 January 1989. See *I.L.M*, Vol. 26, 1987, p.1550.

7 Convention on the Control of Trans-boundary Movements of Hazardous wastes and Their Disposal (Basel, 1989), entered into force on 24 May 1992: see *I.L.M*, Vol. 28, 1989, p. 657.

1998 Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade,[9] and 2001 Stockholm Convention on Persistent Organic Pollutants.[10]

UNEP has facilitated the development of other global and regional conventions by providing environmental assessment and information on significant environmental issues. It also coordinated international actions that led to the development of such instruments. Examples of such UNEP's involvement included the 1992 united nations framework Convention on Climate Change (through the Intergovernmental panel on Climate Change, organized jointly by UNEP and the world Meteorological Organization) and the 1994 United Nations Convention to Combat desertification in those Countries experiencing serious Drought and/or desertification, particularly in Africa (through UNEP's activities to combat desertification). UNEP provided substantive support to the parties concerned to develop the 1999 Basel Protocol on Liability and Compensation for Damage Resulting from Trans-boundary Movements of Hazardous wastes and Their Disposal and the 2000 Cartagena Protocol on Biosafety.

UNEP had promoted the development of non – binding international legal instruments which are designed to urge Governments and other parties to undertake actions to protect the environment on a voluntary basis. Those include guidelines and principles for Governments in the field of shared natural resources (1978), Weather modifications (1980), Offshore Mining and Drilling (1982), Information exchange on hazardous chemicals in international trade (1984,1987 and 1989), marine pollution from land based activities (1987), management of hazardous chemicals (1987), environmental impact assessment (1987), the code of ethics on the international trade in chemicals (1994), the international technical guidelines for safety in biotechnology(1995). The Global programme of Action for the Protection of Marine Environment from Land based Activities (1995) complements the provision on this subject set forth in the 1982 United Nations Convention on the Law of the Sea. At the regional level, UNEP had facilitated the

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[8] Convention on Biological diversity (Rio development Janeiro, 1992), entered into force on 29 December 1993. See *I.L.M*., Vol. 31, 1992, p. 822.

[9] Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade (Rotterdam, 1998), entered into force on 24 February 2004.

[10] Convention on Persistent Organic Pollutants (Stockholm, 2001), entered into force on 17 May 2004.

development of Regional seas Conventions and Protocols including the conventions and protocols for the Mediterranean, the Gulf, the Red sea, west and East African Coastal Zones, the Carribean, the South Pacific, the South-east Pacific and the Black sea. Those conventions and protocols are supplemented by related action plans. Action plans have been developed also for the regions where legally binding instruments are yet to be developed, including east and south Asian Seas and the Northwest Pacific.

UNEP assisted various Governments in the development of regional environmental conventions, such as the 1987 Agreement on the action Plan for the Environmentally Sound Management of the Common Zambezi River system and the 1994 Lusaka agreement on Co – operative Enforcement Operations directed at Illegal Trade in Wild Fauna and Flora.[11] Currently, UNEP is providing assistance to states in the Caspian Sea region to develop a convention on the Caspian environment. UNEP is also providing similar assistance to ASEAN member states to develop the ASEAN agreement on Trans-boundary Haze Pollution.

Conclusion

From the initiation of Montevideo Programme, UNEP has worked enormously on the subject areas mentioned in the Montevideo programme. It has completed number of activities and other activities are under way. The Divisions of the UNEP are also cooperating for the proper implementation of the programme. Now a days, UNEP in its environmental actions, taken into consideration of the programme for further development of international environmental law. UNEP environmental law programmes are revolving around the Montevideo programmes. Montevideo Programmes have effectively guided the work of UNEP in the field of environmental law. It helped UNEP for the development of a number of global and regional multilateral environmental agreements and international legally non binding instruments and also for the systematic provision of technical assistance to a large number of developing countries and countries with economies in transition.

[11] Agreement on Co-operative Enforcement Operations Directed at Illegal Trade in Wild Fauna and Flora (Lusaka, 1994), entered into force on 10 December 1996.

LEGAL REGIME ON HUMAN TRAFFICKING IN THE DARK NET IN INDIA: AN ANALYSIS

-Dr. Chandrakanthi L. and Tito Paul[1]

Introduction

The eponymous Dark Net is that part of the internet wherein the computer traffic[2] between the user and the websites they visit are encrypted[3] to such an extent that it becomes very difficult to identify them. The Dark Net has its user base amongst those who use this as a platform to stay clear of the authorities who would track them whilst they either express their views that clash with some political ideologies or when they commit certain illegal acts. Accessing the internet without leaving a digital footprint[4], is the most important feature of the Dark Net.

Due to the changing times, ever increasing international scrutiny and growing demands of customers who prefer to remain anonymous across the globe and further due to the advent of Crypto-currencies[5]; Human Traffickers have found a new way to keep the wheels of the unholy crime moving-using the medium of Dark Net[6].

Human Trafficking is a lucrative criminal conglomerate that generates more than 32 billion dollars annually[7]. Every year more than 2.5 million people are trafficked globally and 80% amongst them are women and

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2 *Expl.* Computer traffic is the total volume of cells, blocks, frames, packets, calls, messages or other units of data carried over a circuit or network or processed through a switch, router or other system

3 *"What is the Dark Web? The good and bad of the Internet's most private Corner", Ben Wolford, available at www.Protonmail.com (Accessed on 10.12.2020)*

4 *Expl.* Digital footprint means the information about a particular person that exists on the internet as a result of their online activity

5 *"Dark Net and Cryptocurrencies", available at www.interpol.int (Accessed on 10.12.2020)*

6 *"Human Trafficking on the Dark Web", available at www.Deccanchronicle.com (Accessed on 10.12.2020)*

7 Veerendra Mishra, 'Human Trafficking: The stakeholder's perspective', Sage Publications, Delhi, 2013

children[8]. It is a scourge preying upon the moral fabric of society. A devious ilk of Organized Crime that subsists as a specter both in the regional and the international domains.

It is to be foretold herein that there are two fold arguments which state that Human Trafficking in the Dark Net is an Urban Legend[9], or a Creepy pasta[10] as such, nonetheless, recent developments that have occurred in US and Europe, further the pivotal role played by the usage of Artificial Intelligence[11]in detecting these criminal activities have brought into the foray that there exists this evil, how far it runs, is a question which would be answered in time.

Dark net is as mysterious and sophisticated as its name does suggest. Some of the dangers that lurk in the dark net include Identity misuse, malware, ransomwares, drugs and arms smuggling, terrorism and prostitution[12]. Add in Human Trafficking to this mix and it would remain as a major bane for Governments world over to control, especially when at present there are no laws to identify this peculiar part of the Internet.

Conceptualization of Dark Net and Human Trafficking

It is rather perplexing to note herein that there exists no definition of what necessarily constitutes 'Dark Net'. It might be due to the term being obfuscated as there are rather staggering complexities involved in defining Internet and the services within.

Defining Dark Net

To unravel the legalese behind the term, it is pertinent that the concept of 'Internet' be understood exhaustively.

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8 *"Human Trafficking", available at www.onu.delegfrance.org (Accessed on 10.12.2020)*

9 *"In search of the darkest, most disturbing content on the Internet", Caitlin Dewey, Available at www.washintonpost.com (Accessed on 10.12.2020)*

10 *Expl.*Creepypastas means horror related legends that have been copied and posted across the Internet

11 "Artificial intelligence shines light on the dark web", Kylie Foy , Available at www.news.mit.edu (Accessed on 12.12.2020)

12 MihneaMirea, Victoria Wang and Jeyong Jung, 'The not so dark side of the darknet: a qualitative study', Security Journal, Vol. 32, pp 102-118, (2019)

The Internet is a global wide area network (WAN) that connects computer systems across the world[13]. It includes several high-bandwidth data lines that comprise the principal data routes between large, strategically interconnected computer networks and core routers of the Internet. This is also known as the 'Internet Backbone'[14]

These lines are connected to major Internet hubs that distribute data to other locations, such as web servers and various Internet Service Providers. It is to be noted that the concept of 'Websites' or 'Web' is not the same as the Internet. Those are but one of such services provided in the Internet[15].

For understanding what exactly constitutes a 'dark net' in the Internet, a simple illustration of visually analyzing an iceberg floating in the water can be made therein[16].

The crown of the hypothetical iceberg that floats above the water is described as the 'Clear Net'. This is that part of the internet, which is easily accessible to every user. The sites are indexed and are made readily available to the user by means of a web crawling browser. Google Chrome is an example of a Clear Net

The part of the aforesaid iceberg that is submerged below the water but visible from standing at top of the iceberg constitute the 'Deep Net'. This part of the internet is accessible only by the user specifically feeding in the relevant information to the sites that they visit. Examples of the same include the usage of e-mail or Bank websites and the like accessible from the Clear Net.

That part of the iceberg that cannot be seen from above, the sinister part of the Internet wherein anonymity being the fundamental norm is the eponymous Dark Net. This exists within the Deep Net. Some of the websites in the Dark Net include Silk Road (taken down), Hidden Wikis, Empire Market, Majestic Garden etc.,

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13 *"What is a WAN?", Available at www.cloudflare.com (Accessed on 10.12.2020)*

14 *"What is the internet backbone and how it works", Tim Greene, Available at www.networkworld.com (Accessed on 10.12.2020)*

15 *"İnternet vs web: What is the difference", Available at www.lifewire.com (Accessed on 10.12.2020)*

16 *"Deep Web vs Dark Web:What is the difference"Available at www.infotracer.com (Accessed on 10.12.2020)*

To access the Dark Net, it is important to mention herein that as 'Anonymity' is the fundamental norm, special software are required for the user to access Dark Net. Some of those software include: Tor, Freenet, GNUet and the like[17].

> Thus for a proper understanding of the Dark Net, it may be defined as: *'A highly encrypted overlay network within the Internet in the Deep Web which can be assessed only by using specific software, configuration and authorization with the end users not leaving a digital footprint '*

Development of the Dark Net

The term 'DARK NET' had its origin in the 1970s to label networks that were isolated from Advanced Research Projects Agency Network (ARPANET). ARPANET is what had evolved to be the modern day Internet[18].

The advancement of the accessibility to the Dark Net by the General public can be traced to the actions of the US Military. The Dark Net was initially accessed through the principle of 'The Onion Routing' and was developed in the mid-1990s by the United States Naval Research Laboratory employees, mathematician Paul Syverson, and computer scientists Michael G. Reed and David Goldschlag[19].

It was devised by the US military for transmitting information to their operatives posted across various countries thereby using this medium as a shroud to deprive the enemy units from intercepting their communication[20].

In 2004, on instructions of the US Government, the Naval Research Laboratory released the code for Tor under a free license. It was a well thought out strategy by the US military to keep their anonymity secure during secret military communications in the Internet as they had reasoned that the

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17 *Available at www. www.ma-no.org (Accessed on 10.12.2020)*

18 Ibid pg. 2

19 *"Almost everyone involved in developing Tor was (or is) funded by the US government", Levine, Yasha, Available at www.Pando.com (Accessed on 11.12.2020)*

20 *"The Internet's Dark Web, Vexman Available at www.vexmansthoughts. wordpress.com (Accessed on 11.12.2020)*

more people use the system, the harder it was to separate the State's information[21].

In the present times, The Dark net is still most commonly accessed by means of 'The Onion Router' (TOR)[22]. There are various computers (Nodes) that are sophistically configured to act as a medium between the user and the site they visit. The data transmitted is wrapped in different layers of encryption after which it is sent to the recipient through various nodes. The nodes further play a prominent role wherein as they decrypt one layer of encryption, the node gains the information of the next targeted node to which the decrypted data has to be sent. After various layers of decryption through wide systematically arranged nodes will the final recipient get the source data.

It is designed in a way that it leaves behind no Internet Protocol address thereby making it nearly impossible for analyzing the traffic between the users of the TOR service and thereby the users avoid detection by the authorities.

The Dark Net is a world of its own with virtual currencies playing a major role during transactions. The majority of transactions both legitimate and illegitimate are carried through crypto currencies, like Bitcoin. In an Internet Relay Chat[23], firstly, the user has to obtain an invitation or link after which he has to make an account wherein the moderator will do a background check to filter out the authorities[24].The Dark Net transactions either include 'tumbling[25]', or, 'escrow[26,27].

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21 *Available at www.99bitcoins.com, (Accessed on 11.12.2020)*

22 *"How to Access Onion Websites Using a Darknet Browser in 2020", FeranmiAkeredolu, Available at www.darkwebjournal.com (Accessed on 11.12.2020)*

23 Expl. Internet Relay Chat is an application layer protocol that facilitates communication in the form of text

24 Available at https://www.dqindia.com/hidden-secrets-dark-web-evil-twin-internet/ (Accessed on 12.12.2020)

25 Tumbling means those transactions that destroys the connection between the sender of the virtual currency and the recipient

26 Escrow means that the recipient holds the Bitcoins in trust till the packages are delivered

27 Available at www.zdnet.com, (Accessed on 11.12.2020)

The Dark Net in the contemporary era

Darknet in general may be used for various reasons, such as: to protect the privacy rights of citizens from targeted and mass surveillance, for committing crimes using a Computer, that includes illegal file sharing (pornography, confidential files, illegal or counterfeit software, etc.), for selling or purchase of restricted goods or services on darknet markets, for Whistleblowing and news leaks and for circumventing network censorship and content-filtering systems, or bypassing restrictive firewall policies[28].

Some of the software used for Dark Net include anoNet, Decentralized network 42, Freenet, GNUnet, I2P (Invisible Internet Project), IPFS, OpenBazaar, RetroShare(It may be used as a darknet if DHT and Discovery features are disabled), Riffle, Secure Scuttlebutt, Syndie, Tor (The onion router), Tribler and Zeronet[29]

Various studies have focused on the impact of Dark Net on the progression of virtual criminal activities.

Drugs and arms are frequently found for virtual shopping in the Dark Net. Vendors of drugs in Agora, an Amazon like web service in the Dark Net, often brand their opium or cocaine as "fair trade", "organic" or sourced from conflict-free zones[30].

Research undertaken in the Dark Net, more so in a site called as 'Silk Road' suggests that it has indirectly helped the users to reduce harm caused by the illegal drug use as compared with the drugs available physically as there is the sale of high-quality products with low risk for contamination, vendor-tested products, sharing of trip reports, and online discussion of harm reduction practices. Further, certain anonymous health professionals such as "DoctorX" provide information, advice and drug-testing services on the darknet. There is also the concept of review and feedback of products that increase the reputation of the dealer in the Dark Net[31].

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[28] Available at www.torproject.org (Accessed on 11.12.2020)

[29] *"Dark Web — The Unexplored Cyberspace", Raja Srivathsav, Available at www.Medium.com, (Accessed on 12.12.2020)*

[30] *"Dark net markets: the eBay of drug dealing", Jamie Bartlett, Available at www.theguardian.com. (Accessed on 12.12.2020)*

[31] European Monitoring Centre for Drugs and Drug Addiction (2016), The internet and drug markets, EMCDDA Insights 21, Publications Office of the European Union, Luxembourg.

Europol had reported in December 2014[32] that a large amount of physical crimes have moved online, especially of the 'marketing' and 'delivery' part of the criminal business wherein the buyers can get their illegal substances delivered to the place of their choice, without any risk through mail or courier. Further, they can pay for all these transactions through crypto currency having full anonymity and all these ensure that the police cannot identify both the seller and the buyer. This report was further substantiated by another report[33] in June 2015 by the European Monitoring Centre for Drugs and Drug Addiction (EMCDDA) who had produced a report citing difficulties controlling virtual market places via darknet markets, social media and mobile apps.

A June 2016 report[34] from the Global Drug Survey described how the markets are increasing in popularity, despite ongoing law enforcement action and scams. Other findings include consumers making purchases via friends operating Tor browser and Bitcoin payments, rather than directly. Access to markets in 79% of respondents' cases led to users trying a new type of drug.

It is long held that other than the supra, grotesque activities are not carried out in the Dark Net like Human Trafficking.

Often being part of the Urban Legend and exaggerated by the movies, Human Trafficking is thought to take place in the Dark Net. This is further fuelled by speculations existing with respect to 'Red Rooms'-Live streaming of a victim getting tortured and murdered for the sadistic pleasure of the viewers, 'Gladiators'-wherein the viewers pay to watch the victims fight each other to death and 'human experimentations'[35].

Firstly, with respect to live streaming, as in the Dark Net, one's identity is concealed through the usage of multiple proxies with various levels of encryption, it is highly improbable for live streaming to occur in the Dark Net[36].

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32 Available at www.europa.eu (Accessed on 13.12.2020)

33 *"The internet and drug markets", EMCDDA, Lisbon, February 2016, Available at www.emcdda.europa.eu (Accessed on 13.12.2020)*

34 *"More People Than Ever Say They Get Their Drugs on the Dark Web", Joseph Cox, Available at www.vice.com (Accessed on 13.12.2020)*

35 Ibid pg. 2

36 *The Dark Web as You Know It Is a Myth, Joseph Cox, Available at www.wired.com, (Accessed on 15.12.2020)*

And secondly, as imaginations run wild and humans being fundamentally curious, there are multiple sites in the Dark Net which often scams the end users by hooking them showing misleading pictures and later on vanishing with their Bitcoins leaving no trace in the Dark Net[37].

What remains unknown cannot be concluded by mere hypothesis and a good example of the same can be given of the case-Daisy's Destruction[38].

In a site, Hurt2thecore in the Dark Net, a man named Peter Scully had uploaded three sadistic videos that showed 2 girls aged 8 and 12 years and one toddler being sexually abused and tortured by a masked woman. He was given huge sums by pedophilic viewers and this operation was eventually busted by the police in 2015.

Investigators had managed to unearth the fates of the three primary victims in Daisy's Destruction. One was found to be alive as was Daisy, though her treatment had been so vicious that she has lasting physical injuries. Eleven-year-old Cindy had been murdered, allegedly by Scully. Before being strangled to death with a rope, the girl was subjected to bouts of rape and torture and was made to dig her own grave. According to Margallo, the masked woman, Scully videotaped himself killing Cindy.

It was further found that the victims were procured by Scully with promises to impoverished parents of work, education, or were solicited by his two Filipino girlfriends, Carme Ann Alvarez and LiezylMargallo and other female acquaintances such as Maria Dorothea Chi y Chia.

During the trial, the prosecutor alleged that when the girls tried to escape, Scully forced them to dig graves in the basement of the house and threatened that he would bury them there. After five days, the girls were released by the girlfriend who began feeling remorse after coming home to see the two in pet collars and reported what had happened.

Peter Scully was eventually found guilty of Human trafficking, rape and murder and is presently serving a life sentence at Cagayan de Oro City, Phillipines.

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[37] *Available at https://metro.co.uk/2016/09/26/what-is-daisys-destruction-snuff-film-urban-legend-actually-exists-6153626/ (Accessed on 24.12.2020)*

[38] Available at www.dailymail.co.uk, Accessed on 17.12.2020

This is one such example of Human Trafficking that facilitates the usage of Dark Net by Sociopaths such as Peter Scully. Abusers and Traffickers alike relish on the myth surrounding Dark Net and carry on their criminal activities shrouded by multiple security checks on their sites.

Human Trafficking-prevalence in the Dark Net

According to Article 3 of The Protocol to Prevent, Suppress and Punish Trafficking in persons, especially Women and Children, 2000 , Human Trafficking is defined[39] in three parts-Act (What is done), Means (How is it done) and Purpose (Why is it done).

The Act includes-Recruitment, transportation, transfer, harbouring, or receipt of human beings. The Means includes- the usage of threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person. The Purpose includes- The purposes of 'exploitation', which has been defined therein as for prostitution/sexual exploitation, forced labour/services, slavery/practises similar to slavery, servitude and the removal or organs

This extensive definition includes individual components which are woven collectively to form part of a much larger collective, i.e. Human Trafficking. A crime of 'abduction' and the usage of 'force' therein do not constitute 'Trafficking' unless the same is accompanied by the 'purpose of exploitation' mentioned in the third part of the definition.

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[39] According to Article 3 of the Palermo Protocol (a) "Trafficking in persons" shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs; (b) The consent of a victim of trafficking in persons to the intended exploitation set forth in subparagraph (a) of this article shall be irrelevant where any of the means set forth in subparagraph (a) have been used; (c) The recruitment, transportation, transfer, harbouring or receipt of a child for the purpose of exploitation shall be considered "trafficking in persons" even if this does not involve any of the means set forth in subparagraph (a) of this article; (d) "Child" shall mean any person under eighteen years of age.

The 2016 Global report on Trafficking in persons by the United Nations Office on Drugs and Crimes, indicate that approximately 51% of the trafficked persons were women, 21% men, 20% girls and 8% boys. Wherein, 54 % of the trafficked victims were sexually exploited[40]. It is estimated that there are more than 24.9 million victims of labour trafficking. Sexual exploitation is another end purposes of Human Trafficking with more than 54% of all victims involved in slavery, being sexually exploited[41] . A growing form of Human Trafficking is 'Organ harvesting'. The complexity involved in this form of trafficking has made it nearly impossible to separate it from legal transplantation of Human Organs. This form of Human Trafficking generates a profit between 840 million dollars to 1.7 billion dollars annually[42]. The trafficking of children for their usage as soldiers in some parts of Africa and Asia has given rise to the concept of Child soldiers. These children are used in the frontlines of combat, as informants and for other types of crimes. It is estimated that there are over 3,00,000 child soldiers in the world[43] . In the past 10 years, more than 2 million child soldiers have been killed and 6 million severely injured or permanently disabled due to war.

The victims of Human Trafficking often suffer immense trauma caused due to extreme violence and deprivation of their rights. This also includes physical injuries, long term disabilities, depression, forced abortions and PTSD . Data collected from victims of Human Trafficking across 14 countries show that 71% of sex trafficking victims had reported one pregnancy, 21% more than 5 pregnancies and 55% had reported one abortion and 30% multiple abortions.

In 2017, the Task Force Argos, the US Department of Homeland Security and the police in Canada and Europe worked together to unmask the leaders of the world's largest online community of child sexual abusers in the Dark Net-The Child's play which had over 10,52,826 user profiles. The users known as the 'producers' used trafficked children to film them being raped and tortured and had shared the same in the site. Due to the complications of

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40 Available at https://www.unodc.org/unodc/en/human-trafficking/global-report-on-trafficking-in-persons.html (Accessed on 10.12.2020)

41 Available at https://www.ilo.org/global/topics/forced-labour/lang--en/index.htm (Accessed on 10.12.2020)

42 Available at https://gfintegrity.org/report/transnational-crime-and-the-developing-world/ (Accessed on 10.12.2020)

43 *"Child Soldiers Around the World", Eben Kaplan, Available at www.cfr.org, (Accessed on 10.12.2020)*

the dark net, the authorities could only catch the leaders of the dark net site, Benjamin Faulkner and Patrick Falte[44].

Other such sites of child sexual abuse in the dark net having trafficking themes include-Playpen, Elysium, The Love Zone, The Family album and the Giftbox Exchange[45] .

The Interpol had also cracked down a Dark Net ring named as the 'Black Death Group'. These were responsible for trafficking of minor sex slaves to Saudi Arabia as well as selling them to the highest bidder on the dark web. The site was professionally made so as to offer their clientele quality assurance that the girls being sold had no terminal illness and were clean from any transmittable disease of any kind and further, they were not pregnant. They had also expressed their abilities to transport the victims to any destination and also carry out specific abductions if needed and if the client could bear the extra cost[46].

In the United States, the Defense Advanced Research Projects Agency (DARPA) has been working on a multi-year project called the Memory Extender (MEMEX) program since 2014 to help identify human Trafficking on the internet. In order to accomplish the same DARPA is building a web crawler technology that consists of a computer program that automatically and systematically searches web pages for certain words or content.

As the Dark Net is difficult to search as the websites are not indexed, DARPA has been able to overcome this problem through the development of the Dark web crawler technology assisted by Artificial Intelligence. During 6 months' time period in 2016, the MEMEX program had screened 4,752 potential human trafficking cases[47].

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44 *The takeover: how police ended up running a paedophile site, Michael Safi, Available at www.theguardian.com (Accessed on 17.12.2020)*

45 Available at www.europol.europa.eu, (Accessed on 17.12.2020)

46 *"Inside 'Black Death Group,' the Dark Web Gang That Kidnapped a Model", Barbie Latza Nadeau, Available at www.thedailybeast.com (Accessed on 17.12.2020)*

47 *"Human Traffickers Caught on Hidden Internet", Larry Greenemeier, Available at www.scientificamerican.com (Accessed on 17.12.2020)*

Even for a developed country like the United States, monitoring activities in the Dark Net are of much hassle. It is then one has to wonder, the ground reality of such a scenario occurring in a developing country like India.

Indian legal regime on Human Trafficking in the cyber sphere

On the issue of Human Trafficking, India has done much to address the issue with a wide spectrum of laws. It is a signatory to multiple international and bilateral conventions and treaties, further has incorporated the same into its domestic legislations.

Human Trafficking in the Indian legal scenario

Human Trafficking is primarily prohibited under Article 23 (1) of the Indian Constitution[48].

India also has a multitude of legislations that directly and indirectly address the issue of Human Trafficking. Some of them are-the Immoral Traffic (Prevention) Act, 1986, Protection of Children from Sexual Offences (POCSO) Act, 2000, Prohibition of Child Marriage Act, 2006, Bonded labour system (Aboliton) Act, 1976, Child Labour (Prohibition and Regulation) act, 1986, Transplantation of Human Organs Act, 1994, The Juvenile Justice Act, 2015, The Karnataka Devadasi (Prohibition of dedication) Act, 1982 and The Goa Children's Act, 2003

Sections 67 A[49] of the Information Technology Act (as amended), 2008 exclusively addresses the issue of Cyber Crime sans Section 370[50] of IPC.

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[48] Article 23(1) in The Constitution Of India states that

(1) Traffic in human beings and begar and other similar forms of forced labour are prohibited and any contravention of this provision shall be an offence punishable in accordance with law

[49] Section 67A: Punishment for publishing or transmitting of material containing sexually explicit act, etc., in electronic form. -Whoever publishes or transmits or causes to be published or transmitted in the electronic form any material which contains sexually explicit act or conduct shall be punished on first conviction with imprisonment of either description for a term which may extend to five years and with fine which may extend to ten lakh rupees and in the event of second or subsequent conviction with imprisonment of either description for a term which may extend to seven years and also with fine which may extend to ten lakh rupees.

[50] Section 370

Trafficking of persons defined

Whoever, for the purpose of exploitation, (a) recruits, (b) transports, (c) harbours, (d) transfers, or (e) receives, a person or persons, by—

The major criminal legislation of India is the Indian Penal Code, 1860 (hereinafter referred to as the IPC). After the 2013 amendment, Section 370 and Section 370 A of the IPC exclusively deals with the offence of Human Trafficking. The gap in the said section which needs the demonstration of force, deception or coercion to constitute the offence of child trafficking is addressed in Sections 372 and 373[51]which criminalizes all forms of child

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using threats, *or* using force, *or* any other form of coercion, *or* by abduction, *or* by practising fraud, *or* deception, *or* by abuse of power, *or* by inducement, including the giving *or* receiving of payments *or* benefits, in order to achieve the consent of any person having control over the person recruited, transported, harboured, transferred or received,commits the offence of trafficking1.

Explanations

1. The expression "exploitation" shall include any act of physical exploitation or any form of sexual exploitation, slavery or practices similar to slavery, servitude, or the forced removal of organs.
2. The consent of the victim is immaterial in determination of the offence of trafficking1.

Whoever commits the offence of trafficking shall be punished with rigorous imprisonment for a term which shall not be less than seven years, but which may extend to ten years, and shall also be liable to fine.

Where the offence involves the trafficking1 of more than one person, it shall be punishable with rigorous imprisonment for a term which shall not be less than ten years but which may extend to imprisonment for life, and shall also be liable to fine.

Where the offence involves the trafficking of a minor, it shall be punishable with rigorous imprisonment for a term which shall not be less than ten years, but which may extend to imprisonment for life, and shall also be liable to fine.

Where the offence involves the trafficking of more than one minor, it shall be punishable with rigorous imprisonment for a term which shall not be less than fourteen years, but which may extend to imprisonment for life, and shall also be liable to fine.

If a person is convicted of the offence of trafficking of minor on more than one occasion, then such person shall be punished with imprisonment for life, which shall mean imprisonment for the remainder of that person's natural life, and shall also be liable to fine.

When a public servant or a police officer is involved in the trafficking of any person then, such public servant or police officer shall be punished with imprisonment for life, which shall mean imprisonment for the remainder of that person's natural life, and shall also be liable to fine.

[51] **Section 372. Selling minor for purposes of prostitution, etc.—**Whoever sells, lets to hire, or otherwise disposes of any 1[person under the age of eighteen years with intent that such person shall at any age be employed or used for the purpose of prostitution or illicit intercourse with any person or for any unlawful and immoral purpose, or knowing it to be likely that such person will at any age be]

trafficking. Other than the aforesaid sections, there are sections 366 A, 366 B and 374[52] that supplant Section 370 .

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employed or used for any such purpose, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall be liable to fine. 2[Explanation I.—When a female under the age of eighteen years is sold, let for hire, or otherwise disposed of to a prostitute or to any person who keeps or manages a brothel, the person so disposing of such female shall, until the contrary is proved, be presumed to have disposed of her with the intent that she shall be used for the purpose of prostitution. Explanation II.—For the purposes of this section "illicit inter-course" means sexual intercourse between persons not united by marriage or by any union or tie which, though not amounting to a marriage, is recognised by the personal law or custom of the community to which they belong or, where they belong to different communities, of both such communities, as constituting between them a quasi-marital relation.]

Section 373. Buying minor for purposes of prostitution, etc.—Whoever buys, hires or otherwise obtains possession of any 1[person under the age of eighteen years with intent that such person shall at any age be employed or used for the purpose of prostitution or illicit intercourse with any person or for any unlawful and immoral purpose, of knowing it to be likely that such person will at any age be] employed or used for any purpose, shall be pun-ished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine. 2[Explanation I.—Any prostitute or any person keeping or manag-ing a brothel, who buys, hires or otherwise obtains possession of a female under the age of eighteen years shall, until the con-trary is proved, be presumed to have obtained possession of such female with the intent that she shall be used for the purpose of prostitution. Explanation II.—"Illicit intercourse" has the same meaning as in section 372.]

[52] **S. 366 A: Procuration of minor girl**

Whoever, by any means whatsoever, induces any minor girl under the age of eighteen years to go from any place or to do any act with intent that such girl may be, or knowing that it is likely that she will be, forced or seduced to illicit intercourse with another person shall be punishable with imprisonment which may extend to ten years, and shall also be liable to fine.

S. 366 B: Importation of girl from foreign country

Whoever imports into India from any country outside India or from the State of Jammu and Kashmir any girl under the age of twenty-one years with intent that she may be, or knowing it to be likely that she will be, forced or seduced to illicit intercourse with another person, shall be punishable with imprisonment which may extend to ten years, and shall also be liable to fine

S. 374: Unlawful compulsory labour

Whoever unlawfully compels any person to labour against the will of that person, shall be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both

India has also ratified the South Asian Association for Regional Cooperation (SAARC) convention on preventing and combating trafficking in women and children for prostitution, 2002 and the SAARC convention on regional arrangements for the promotion of child welfare in South Asia, 2002. Further, it has also signed a Memorandum of Understanding with Bangladesh for a bilateral mechanism to deal with cross border trafficking.

Other international instruments to which India is a signatory of are: The Palermo Protocol, The International convention for the suppression of Traffic in persons and of the exploitation of the prostitution of others, The Conventional on the elimination of all forms of discrimination against women, 2981, The Beijing Rules, 1985, The Convention on the Rights of the Child, 1989, The Riyadh guidelines, 1990, The ILO Convention, 1999 and the optional protocol on the same of children, child prostitution and child pornography, 2000

Inspite of having been a signatory to a multitude of covenants, conventions and treaties and having sufficient domestic legislations, in India, the problem of human trafficking is rampant and this can be attributed to the various loopholes in the legalese.

Overall, the issue of Human Trafficking in itself is not well addressed in India. When technology is annexed to it, the complexities are perplexing.

Lacunae in the Indian cyber law to address Human Trafficking in the Dark Net

The major drawback in addressing the issue of human trafficking in the dark net in India is, ironically, identifying that such a problem does exist and is slowly rooting itself in the Indian cyber world that does not have any laws whatsoever to effectively control such a serious issue.

In a country where there is no clear law for addressing the issue of Human Trafficking, controlling the same in the Dark Net would be of great concern.

Though no case has yet been 'reported' in India in relation to Human Trafficking in the Dark Net, suffice to say it doesn't mean that such instances are not happening and further the existing laws doesn't preclude nor provide any protection for such events not happening in the future.

Further the police uses Honeypot decoy computers, poses as customers and service providers, the issue of jurisdiction, lack of sensitization of the police personal and overall nature of digital evidence in India fails to address the issue of illegal activities in the Dark Net carried right under their noses[53].

Another complication is that of crypto currency. When there is no proper law to regulate crypto currency, the unreasonable unilateral ban on financial service firms trading in virtual currencies by the Reserve Bank of India order in 2018 was quashed by the Supreme Court in *Internet and Mobile Association of Inida vs Reserve Bank of India*[54].

This act of the Supreme Court has left loose ends open, wherein the Government is now left pondering how to tackle such an issue, more so as it pertains to Dark Net, when Governments World over doesn't have any solution for the same.

To tackle the issue of Human trafficking in the dark net, there must be regulations done in the cyber law, criminal law, criminal procedural law and the banking law of a country with an effective law on Human Trafficking right at the core of everything.

As the cyber world is ever evolving, it is necessary there must be regulations that are in tune with the changing times. The Information Technology Act, 2000 (amended 2008) is inadequate to keep a check on the modern cyber crime in the dark net as is the Indian Penal Code, 1860, The Criminal Procedural Code, 1973 and the Reserve Bank of India Act, 1934.

Addressing the lacunae in the statutes on Human Trafficking in the Dark Net

In the case of 'Anuradha Bhasin vs UOI'[55], heard in the Supreme Court of India, there were the mention of the terms Dark Web and Hashtags during the hearing. The bench had asked for clarifications from the Solicitor General, Tushar Mehta to clarify what the terms supra meant, as there were no definitions of such terms in the existing legislation. Such is the state of cyber

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53 *"India witnessing sophisticated cyber-attacks from organised and unorganised players", Sachin Dave, Available at www.economictimes.indiatimes.com (Accessed on 15.12.2020)*

54 2020 SCC Online SC 275

55 WRIT PETITION (CIVIL) NO. 1031 OF 2019, SUPREME COURT OF INDIA, 10 January, 2020

advancement in our country, that though there is much advancement in the field of science and research, existing laws have not been able to cope up with them[56].

Dark Net has to be firstly 'defined' in the cyber law and new sections have to be added to address the issue of cyber crimes, more particularly all the forms of trafficking-Labour,Sex,Organ,Usgae of children and the like. Stringent punishments are to be meted out for even trying to access such a site in the Dark Net.

Another thing that needs a more elucidated definition in the new law is 'Jurisdiction', as the dark net has no physical demarcations in the cyber sphere to differentiate jurisdictions between States.

Procedural sections have to be expounded in such a law and this has to be done in correlation with such amendments in the IPC and the CrPC. There must be a denial of anticipatory bail in grave crimes in the cyber sphere that are to be defined in the amended sections.

The Government has to make specific Rules in relation with such sections that help them to make use of Network Identify Techniques and Indian Government's own Memory Extender program in the Dark Net.

In the Criminal Procedural Code, 1973, with relation to Sections 93 to 101[57], there must be amendment done to incorporate the issuance of 'Hack warrants' by the Courts. If there is a strong reason to believe that a person's activity in the dark net has considerable impact in engaging the nefarious elements of the society, then with the permission of the Court, with a hack warrant, the authorities are to be given the power to hack websites and systems to locate the culprit. They may also employ ethical hackers for the said purpose with considerable restrictions in Rules read with the specified section.

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[56] "What's a Hashtag?' Asks SC As Govt Justifies Kashmir Restrictions", VAKASHA SACHDEV,Available at www.thequint.com (Accessed on 15.12.2020)

[57] Sections 93 to 101 of the Code of Criminal Procedure, 1973 deals with Search Warrants

A study for the same can be done by analysing the case of United States vs. Alex Levin[58]. Issuance of proper Hack Warrants and investigate techniques are to be defined clearly and further are the gathering and identification of the digital evidence so collected. The United States follows the principle of 'Fruit of the poisonous tree'[59] but not India. Hence, it is of paramount importance that the sections and Rules be done with more powers to the police (with ample safeguards for misuse) for evidence collection as it pertains to the Dark Net, an area of the cyber world where it is searching for a matchstick in the darkness, as if the investigative methods are stringent, the culprit may disappear permanently into the pathos of the Dark Net.

Under Section 3[60] of the Indian Evidence Act, such evidence collected from the pursuance of such hack warrants are to be treated as electronic evidence and suitable amendments are to be carried out in 65 A and B of the Act supra.

In the Indian Penal Code, amendments are to be made in such effect that any criminal activity done in the dark net would have a greater punishment than what would be given if done outside the cyber world. This would deter the criminals from resorting to such twisted methods and suitable regulations in the existing laws would effectively control such activities in the physical world.

Section 22[61] of the Reserve Bank of India Act, 1934, has to be amended to allow for the regulation of crypto currencies by the non banking financial institutions with suitable regulations. This is better than outrightly banning

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58 United States v. Levin, CRIMINAL ACTION NO. 15-10271-WGY, (D. Mass. Apr. 20, 2016)

59 *Expl.*The doctrine of the "fruits of the poisonous tree" holds that the evidence (fruit) from an illegal search or seizure which is a tainted source (the tree), would also be tainted and hence, inadmissible

60 Section 3 of the Indian Evidence Act talks about the Interpretation Clause

61 Section 22 of the Reserve Bank of India Act specifies the '**Right to issue bank notes'** (1) The Bank shall have the sole right to issue bank notes in India, and may, for a period which shall be fixed by the Central Government on the recommendation of the Central Board, issue currency notes of the Government of India supplied to it by the Central Government, and the provisions of this Act applicable to bank notes shall, unless a contrary intention appears, apply to all currency notes of the Government of India issued either by the Central Government or by the Bank in like manner as if such currency notes were bank notes, and references in this Act to bank notes shall be construed accordingly.

crypto currencies as the world is slowly moving towards a unified system in the cyber world and it would seem unwise to cut off from everything right from the start.

As 'The Trafficking of Persons (Prevention, Protection and Rehabilitation) Bill'[62], is still in it's infancy, there is a positive move by the Government in atleast making sure India has a core anti Human trafficking law.

The new anti trafficking law lacks in addressing the issue of Dark Net, thus an inculcation of all the above-IT Act, IPC, CrPC and RBI Act has to be incorporated with all the definitions, procedural and punitive sections and they are to be co-related in the anti trafficking law for effectively controlling trafficking in the dark net.

All these would for if not a large extent control Trafficking in the Dark Net in India, more so as this problem is yet to take a strong ground in the subcontinent due to the lack of users. Hence there is an imminent need for a major upheaval of laws.

A small step forward in addressing complex cyber world cases had been undertaken by the Delhi High Court in *UTV software communication Ltd. Vs 1337x.to*[63]*,* wherein the court had issued a special type of injunctive relief called 'Dynamic Injunction' to keep in check the Hydra Headed Websites across the Internet.

The Kerala Police has done much with limited resources in building the 'Cyber dome'[64], to regulate the cyber security in the State of Kerala. This was done in association with the Bureau of police research and development (BPRD) and the Indian Computer Emergency Response Team (CERIn). Further CERTIn have frequently thwarted terrorist cyber attacks from ISI and China[65].

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62 The Trafficking of Persons (Prevention, Protection and Rehabilitation) Bill, 2018

63 CS(COMM) 724/2017 &ors., High Court of Delhi, 10.04.2019

64 *Available at www.cyberdome.kerala.gov.in (Accessed on 23.12.2020)*

65 *"India facing more cyber attacks from China and Pakistan since nationwide lockdown", AnandiChandrashekar and Surabhi Agarwal, available at www.m.economictimes.com (Accessed on 23.12.2020)*

In the month of February 2020, the Delhi Zonal Unit of Narcotics Control Bureau had arrested for the first time a narcotics operative who was carrying on his illegal business in Empire Market and Majestic Garden in the Dark Net[66].

Similarly, in the month of November 2020, the Bangalore Police had arrested ten people for importing drugs using the Dark Net[67].

Though these are but small flickers of light in the dark abyss of the Dark Net, these flickers are but of great significance to the Authorities rather than them searching blindly in the virtual darkness.

Conclusion

The Dark Net is a necessary evil. As with any technology, it is the usage that makes all the difference there is. Trafficking of persons, drugs and weapons are to be condemned and the root of which have to be eradicated. Though India is still miles away from being the target of Dark Net effects, there will be a time, when this State too will have to cope up with the severity of the problem when more user base sprouts up.

A joint international task force is needed to weed out the issue of trafficking in the Dark net. Treaties are to be made to hand over the perpetrators hiding in India and scamming/colluding/perpetrating across the globe due to the weak cyber laws and the criminals are to be severely punished so that they become an example of what happens when anonymity breaches the thin veil of invading upon privacy of another.

Instead of banning sites that show obscene pictures, the Government should strengthen the existing laws to include appropriate punishments for even trying to access them.

The issue of Human Trafficking has to be sensitized with the authorities and stringent punishments have to be accorded to the ones found guilty. The State should take a leaf or two from the United States and accordingly bolster the Country's cyber security with the enhancements in the field of Artificial intelligence.

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[66] *"India's first 'darknet' narcotics operative held", Available at www.thehindu.com, (Accessed on 23.12.2020)*

[67] *"Ten arrested in Bengaluru for importing drugs using darknet", Available at www.newindianexpress.com (Accessed on 23.12.2020)*

The problem of Human Trafficking in the Dark Net is still in its infancy much like the Country's cyber laws. The regulation of Crypto-currency itself is not addressed appropriately .

In that principle, it would be appropriate to include the provision of inculcating Dark Net into the new Trafficking law and if evidence is found on the Accused for having accessed Dark Net, his punishment but be a deterrent to his community of criminals.

The harsher the punishment, the more infrequent will be the crime.

WOMEN EMPOWERMENT IN INDIA: A OVERVIEW OF 73RD AMENDMENT

-Dr. C.R Jilova*

Introduction

Mahatma Gandhi advocated panchyat raj as the foundation of India's Political system. Political empowerment for women is regarded as a key driver for economic and social empowerment. The most important Constitutional amendments[1] brought about significant changes in the political scenario of the country with regard to women's participation in politics. However, in India, attempts to secure political representation in higher political arenas have not been successful. Fresh impetus is required with a modern approach. Indian democracy is 60 years old now, yet the participation of women in politics has actually declined since the days of the freedom movement, both in quantity and quality. The ideology of division of labor forces women to be confined to the private sphere of life & restricts women's existence within domestic roles as wives and mothers. The male hegemony prevails in the decision-making processes both in private as well as public domains. Politics should be a democratic, participatory, accountable & transparent means to bring about a just, humane & equitable society. Political system should incorporate the interests of & be accessible to all sections of society, of which women constitute half of the population. High cost of electioneering, improper & illegal practices, violence & corruption are some reasons that prevent women from participating in politics. It is high time to seek & work towards transformation of politics that would establish a decisive role for women at all levels of governance & politics.

The 73rd Constitutional Amendment has constitutionalized the elected grassroots level local governing bodies i.e. Panchayats & Municipal Corporation as the third strata of the Government structure. These are self-governing institutions that stand for a decentralized, participatory, accountable, transparent, relevant polity administration. The Constitutional Acts have also set into motion a process that has made women's representation in local level decision-making a reality.

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1 (73rd and 74th Constitutional Amendments)

Historical Background of Local Governance

The Panchayat Raj, a system of self-governance, was introduced in 1959, following the submission of Balwant Rai Mehta Committee Report of 1957. The Balwant Rai Mehta Committee had recommended that besides 20 members of the Panchayat Samiti (block level body), there should be two women as co-opted members. This may be said to be the first official declaration for women to enter active politics at the grassroots. Following this, the Maharashtra Zilha Parishad (district body) and Panchayat Act[2], provided for nomination of one or two women to each of the three bodies, in case no women were elected. In many parts of India, women were recruited to the Panchayat Raj by co-option rather than through election. The 64th Constitutional Amendment Bill was introduced in Parliament in 1989, which provided for 30% reservation for women. But it could not be passed. The Bill was defeated by a narrow margin in the Upper House. The Bill was reintroduced in September 1991, as the 72nd & 73rd Constitutional Amendment Bills with an additional provision such as one-third representation for women in chairperson positions. The Bills were finally passed on December 1992. Ratified by half the states by April 1993, they came into operation as 73rd & 74th amendments to the Constitution of India.[3]

The provisions of the 73rd & 74th Amendment had far reaching consequences. It provided for direct elections to all the seats for the Panchayat – from the village level to the intermediary block committee[4] to the district level[5] for a period of five years. The act is most significant for the reservation for women and Scheduled Caste (lower caste) and Scheduled Tribes. There are certain general features, which could be taken advantage of by women. Such as direct elections for membership and Sarpanch[6] post, at the local as well as the block level. If the states so desired, they could make provisions for reservation to the membership for chairpersons to citizens of backward classes.

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2 Act of 1961.

3 On 24th April 1993.

4 (Panchayat Samiti)

5 (Zilha Parishad)

6 (village head or chairperson)

Position of Women in the Panchayati Raj System

The situation created by the Act was so drastic that it brought out women straight from the kitchen into the fray of politics & administration with no training or experience whatsoever in public life. Women have been given power but they are not seen as political entities. They are seen as a source of status enhancement. Thus these elected women were mere fronts for their father or husbands or father-in-law or sons & very often did not attend the Gram Panchayat[7] out of fear or ignorance. As a result, they are considered as proxy members or absentee members. New appellations such as "Sarpanch Pati" are used to describe husband chairpersons & members of Gram Panchayats, implying that they performed the Panchayat's work on behalf of their wives. Elected women Sarpanch in many villages could not answer questions posed to them since their husbands would answer on their behalf. Further, although the reservation of 33% of seats under the Panchayat Raj system has been a morale booster for women in rural India, their husbands & other men in the village were yet to reconcile themselves with the women's new status. Women Sarpanchs who go out with men for work related to the Gram Panchayat or Zilha Parishad, are castigated as 'bad women' and they becomes victims of character assassination. Women in all states complained of the lack of information and experience, which made them diffident of their ability to handle the job, or working in the system. They had no idea as to what constituted a meeting, what was an agenda, how meetings were to be conducted and what was expected of them as elected representatives.

Women Sarpanchs are often marginalized. Men, who still turn to the previous male Panchayat members for guidance & advice, do not take their leadership in the village seriously. Added to this was the age-old tradition of deferring to the males for decision making & seeking their advice. Men expectedly, in many cases, were antagonistic to the women. In Kotgal Gram Panchayat of Gadchiroli district in Maharashtra, for the first time 11 candidates from lower caste won the elections in 2002. In the first Gram Sabha held in December 2002, they protested against the one topic in the agenda of the meeting relating to "The right of the Sarpanch & Secretary over authority in financial transactions". Forcefully, they made a resolution that the Sarpanch and the Secretary would have no authority in financial transactions. Her basic right, by the virtue of being the Sarpanch, was denied. Women soon acquired confidence & started taking independent action. Retribution,

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[7] (village governing body)

however, was immediate, which ranged from intimidation to physical violence.

Across the country today, there is a marked presence of women in the Panchayats. There are estimated more than 10 million[8] women in all three tiers of Panchayat Raj Institutions[9]. Thus, the positive discrimination of PRI has initiated a momentum of change. Women's entry into local Government in such large numbers has shattered the myth that women are not interested in Politics & have no time to go to meetings or to undertake all the other work that is required in political party processes. The analysis of emerging patterns of women leadership at Panchayats has revealed that elected women Sarpanch were less than 50 years of age. They mostly belonged to the age group between 25 & 45 years. Almost all of them were married. This dispels the myth that rural power is the monopoly of the aged. The younger generation of women opting for political representation is a sign of change. A substantial number of women members, particularly at Gram Panchayat level, were illiterate or partially illiterate. But now many well- educated women are taking part in politics. Initially there was a preponderance of women representatives from well to do dominant caste groups. Now women from backward classes and low caste are effectively mobilized to participate. Almost half of the women representatives are from lower caste & tribal, 30% are from families below the poverty line, 14% are from landless families & 22% are working as hired labor. Reservation of Seats has enabled not only the poor & marginalized women but also the women from conservative minority sections.

The Role of Panchayati Raj in Political Empowerment of Women

- *Article 243 D* of the Constitution provides that not less than one-third of the total number of seats in every Panchayat shall be reserved for women including Chairpersons in every Panchayats and such seat may be allotted by rotation to different Constituencies/ Panchayats at each level.
- The 73rd Constitutional Amendment provided for the increased participation of women in the political institutions at the village, taluka and district level. This has enabled several women, who had never been in power and even those illiterate, to enter politics.

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[8] Lawmakers' panel attached to urban development ministry headed by Janata Dal (United) Leader Sharad Yadav.

[9] (PRI)

- Bringing women into politics through the Panchayat Raj Institutions system (PRI) was an act of positive discrimination. Crucially, PRI has helped to change women's perceptions of themselves. Women have gained a sense of empowerment by asserting control over resources, officials and, most of all, by challenging men. PRI has also given many women a greater understanding of the workings of politics, in particular the importance of political parties.
- PRI has given many women a greater understanding of the workings of politics, in particular the importance of political parties. PRI has helped to change local government beyond simply increasing the numerical presence of women. There is now a minority of women who are in politics because of their leadership qualities or feminist consciousness.
- Some of the ways in which women, through PRI, are changing governance are evident in the issues they choose to tackle; water, alcohol abuse, education, health and domestic violence.
- Women are also taking action against child marriage and child domestic labour, whilst promoting girl-child education. As with education, women have used their elected authority to address quality health care as a critical issue.

Impact of Women Reservation:

In the recent years the women started taking hold of their responsibilities of panchyat independently. Now the women understood their roles and responsibility being elected representatives of a village or municipalities. Many educated women started participating in the election process so that they can make a social change. As everybody know about the story of Ms. Chhavi Rajawat, MBA and the youngest Sarpanch in India. She had quit her career in the corporate sector to become a Sarpanch of her village Soda in Rajasthan. She had earned worldwide recognition for her efforts for the transformation of the society. Reservation policies clearly have a strong impact on women's representation. Women participate more in the political process in Gram Panchayat in which seats are reserved for women. In that Gram Panchayat, there are significantly more investments in drinking water, road construction, health, public toilets etc. Women representatives devote more energy to women-specific issues than men do, and to be more successful in passing legislation on women's issues when they propose them. Women's experience of being involved with the PRI has transformed many of them. They have gained a sense of empowerment by asserting control over resources, officials and most of all, by challenging men. They have become articulate and conscious of their power. Despite their low- literacy level, they

have been able to tackle the political and bureaucratic system successfully. They have reported regular attendance at Panchayats meetings. They have used their elected authority to address, critical issues such as education, drinking water facilities, family planning facilities, hygiene & health, quality of healthcare and village development. They have also brought alcohol abuse & domestic violence onto the agendas of political campaigns. In these & other ways, the issues that women have chosen differ from conventional political platforms, which are usually caste/ethnic/religion based. The government is also taking various steps so as to address the problems faced by these elected women representatives to administration of their duties. Women and men have different policy priorities. In developed countries, women are more likely to support liberal policies, a difference known as the "gender gap". The primary responsibilities of women in rural areas in India, besides working on the fields, are to fetch water, fuel & to take care of children. Child health has been shown to be more responsive to women's income than to men's income.

Conclusion

With women's empowerment and strengthening of country's parliamentary democracy at the grassroots level high on its legislative agenda, the Union government is to have four constitutional amendments in the future parliamentary sessions to achieve the twin objectives. While one seeks to ensure the much-awaited one-third reservation for women in Lok Sabha and state legislative assemblies, two are for enhancing quota for women from existing 33 per cent to 50 per cent of the total seats of panchayati raj institutions and urban local bodies. Two other bills of the Constitution[10] Bill, 2009 and the Constitution[11] Bill, 2009, respectively seeking to increase the reserved seats for women in rural panchayats and urban local bodies from one-third to half of the total number of seats too are already pending with parliament since many sessions. The government had decided to enact the two legislations in line with former President Pratibha Patil's address to Parliament[12] had said: *"The women suffer multiple deprivations of class, caste and gender and enhancing reservation in Panchayats (and local urban bodies) will lead to more women entering into the public sphere*". While women will be accorded 33 percent reservation in Lok sabha and state

[10] (110th Amendment)

[11] (112th Amendment)

[12] On June 4, 2009.

assemblies for the first time after the passage of the Constitution[13] Bill 2010, they have been enjoying 33 percent quota in panchyati raj institutions and various urban local bodies after passage of 73rd and 74th amendments to the Constitution in 1993.

The lawmakers' panel, which examined the bill for raising women's quota in panchayats to 50 percent, termed the 73rd amendment as "a landmark legislation" which gave "India the unique distinction of having more elected women representatives (EWRs) than the rest of the world together."

Pointing out that the 73rd amendment has ensured election of over 10,48,148 elected women representatives out of total 28,51,739 representatives in country's three-tier rural panchayats, the panel[14] said it has caused a "silent revolution" to "the process of decentralization of parliamentary democracy" in the country.

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13 (108th Amendment)

14 Lawmakers' panel attached to urban development ministry headed by Janata Dal (United) Leader Sharad Yadav.

RIGHTS OF FEMALE PRISONERS UNDER INDIAN CONSTITUTION: AN ANALYSIS

-Dr. C. B. Ranganathaiah*

"It is said that no one truly knows a nation until one has been inside the jails. A nation should not be judged by how it treats its highest citizens, but how it's lowest ones"

Nelson Mandela

Introduction

Every person in the society deserves equality. These rights form the basis of every human being which have been recognised by various Constitutions of the world. If the people don't follow these rules but infringes other's rights they are entitled for punishment. Though the person has committed crime, his rights cannot be curtailed. He can enforce his rights except few. Jails are the integral part of Criminal Justice System. These places are considered as rehabilitation centres. The main aim of the criminal justice system is that if a person is ones a criminal, it does not mean that he is always a criminal for his lifetime.[1] There is a famous quote "Hate the crime and not the Criminal", by Mahatma Gandhi.

According to the State list every state has to achieve the goal of protecting the society from the convict and also to reform the offender. Thus, under Constitution of India, the Supreme Court has interpreted various fundamental rights for the benefits of prisoners such as- Article 14, 19, 21, 22, 32, 37, 39A, 226. It is a fact that the government gives all the facilities to the inmates of the jails, as per jail manual. But, it is the female prisoners who are facing problems in spite of these facilities. In the year 2015, as per the Justice Krishna Iyer Committee Recommendation, established a separate Central Prison for women at Tumakuru District, Karnataka.

The following are some of the problems which are faced by female prisoners:

A. Poor living Accommodations or Overcrowding of Prisons.
B. Lacks with basic facilities of sanitation and hygiene.
C. Poor spending on health care and welfare.
D. Problem of Women Prisoners in India- custodial rape

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Lets discuss each one by one:

A. Poor Living Accommodations or Overcrowding of Prisons: This is one of the most severe problems faced in Indian prisons both to the male and female prisoners. In prisons, a specified size for cells and barracks is provided according to the guidelines of the National Prison Manual. Barracks are ideally only for 20 prisoners and dormitories to house only four to six prisoners each. Overcrowding has worsened hygiene conditions and health problems with even minor infections spreading quickly. The disproportionately low number of toilets and bathrooms exacerbate the situation. Overcrowding also has severe psychological effects on prisoners forced to live in such close quarters with one another.

B. Lacks basic facilities of sanitation and hygiene: In India, most of the female prisoners age from the age group of 18-50 was a large majority that is 81.8% females falls under the menstruating age group where there is an increasing need to provide proper sanitation facilities as well as access to adequate menstrual hygiene products. As they should be provided with proper sanitary pads to maintain their hygiene but it is reported that they charged for sanitary napkins in some prisons or are only provided a set monthly number irrespective of need. Thus, this leads women to resort to using unhygienic materials such as cloth, ash, pieces of old mattresses, newspapers etc.

C. Poor spending on Health care and welfare: In India, an average of Rs.10,800 per inmate per year was spent by prison authorities during the year of 2005, distributed under the heads of food, clothing, medical expenses, vocational & educational, welfare activities and others.[2] The maximum expenditure is on food in Indian prisons. The States like West Bengal, Punjab, Madhya Pradesh, Uttar Pradesh, Bihar and Delhi reported relatively higher spending on medical expenses during that year, while in Bihar, Karnataka and West Bengal reported relatively higher spending on vocational and educational activities. Tamil Nadu, Orissa and Chhattisgarh reported as it is relatively higher spending on welfare activities regarding with the prison[3].

D. The problem of Women Prisoners in India- custodial rape: In the case of *State of Maharashtra vs. C.K.Jain*[4], there was rape in police custody. Regarding evidence, the Supreme Court emphasized that in such cases unless the testimony of the prosecution was unreliable, collaboration

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2 (National Crime Records Bureau 2005)

3 National Crime Records Bureau (NCRB)

4 State of Maharashtra vs. C.K.Jain, AIR 1990 SC 658

normally should not be insisted upon. Secondly, the presumption is to be made that ordinarily, no woman would make a false allegation of rape. Thirdly, delay in the making of the complaint is not fatal and quite understandable reasons exist for the delay on the part of the victim woman in making a complaint against the police. As far as the sentence was concerned there was no room for leniency, the punishment must be exemplary.

The Judiciary has interpreted various rights as the Rights of Prisoners which are mentioned below-

Rights of Prisoners recognised under Constitution of India: A convicted prisoner is not barred by his fundamental rights though he truly not enjoys all the fundamental rights like other common men some of the fundamental rights are recognised for the prisoners as a basis of human rights. Constitution of India has not clearly mentioned the rights for prisoners but through judicial interpretation, they are recognized through precedents, as in the leading case of T.V. Vatheeswaran v. State of Tamil Nadu[5], it was held that the Articles 14, 19 and 21 are available to the prisoners as well as to the common man.

Article 14 of the Constitution of India acts as a torchbearer for the prison authorities and its administration to determine various segregations of prisoners and their object of reformation.[6] Article 19 of the Constitution of India guarantees six freedoms to all citizens of India. There are certain rights which are not for the prisoners but among those freedoms, the freedom of speech and expression[7]and freedom to become a member of an association is there for the prisoners.

Article 21: Today, the judiciary, by its art of interpretation, has discovered a variety of rights of suspects, accused persons and prisoners, who are in police custody. The fundamental right of 'life and personal liberty' has been interpreted by the Supreme Court of India in a broad spirit and various rights have been included in the ambit of Article 21 of the Constitution. Article 21 of the Constitution of India focuses on two crucial concepts i.e., right to life and principle of liberty. In the cases like- Maneka Gandhi, Sunil Batra (I), M.H.Hoskot, the Supreme Court has taken the view that the

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5 T.V. Vatheeswaran v. State of Tamil Nadu, AIR 1983 SC 361: (1983) 2 SCC 68.

6 Chowdhury Roy Nitai, Indian Prison Laws and Correction of Prisoners, Deep and Deep Publications, New Delhi, 2002, p.75.

7 Article 19(1)(a) of the Constitution of India.

provisions of part III of Constitution of India there needs to be a widest possible interpretation.

It was held that:

- Right to legal aid[8],
- Right to speedy trial[9],
- Right to have an interview with a friend, relative and lawyer[10],
- Right to live with human dignity,
- Right to livelihood,
- Right of inmates of protective homes[11], etc.

Though these rights are specifically not mentioned as fundamental rights under article 21 of the constitution with the help of judicial creativity they are recognised as the Rights of Prisoners.

Following are the rights which are guaranteed to the prisoners under the Indian Constitution though Judicial Interpretation:

1. **Right to Free Legal Aid:** It also means to provide Financial Aid to a person in a matter of legal disputes. The Constitution 42nd Amendment Act, 1976 has inserted Free Legal Aid as one of the Directive Principles of State Policy under Article 39A in the Constitution. The Indian Constitution does not expressly provide the Right to Legal Aid. But the judiciary has shown its favour towards poor prisoners those who are not in a position to engage the lawyers of their own choice because of their poverty. In *M.H. Hoskot v. State of Maharashtra*[12] the Supreme Court laid down that right to free legal aid at the cost to the state to an accused who could not afford legal services for the reason of poverty, indigence situation was part of fair, just and reasonable procedures implicit in Article 21. a three Judges Bench (V.R.Krishna Iyer, D.A.Desai and O.Chinnappa Reddy, JJ) of the Supreme Court reading Articles 21 and 39-A, along with Article 142 and Section 304 of Cr.PC together declared that the Government is under a duty to provide legal services to the accused persons.
2. Right to have Interview with Friends, Relatives and Lawyers: In *Sheela Barse v. State of Maharashtra*[13], the court held that interviews of the prisoners become necessary as otherwise the correct information may not

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8 M.H. Hoskot v. State of Maharashtra, (1978) 3 SCC 544
9 Rattiram v. State of M.P., (2012) 4 SCC 516.
10 Jagmohan Singh v. State of U.P., AIR 1973 SC 947.
11 Upendra Baxi v. State of U.P., (1983) 2 SCC 308
12 M.H. Hoskot v. State of Maharashtra, (1978) 3 SCC 544
13 Sheela Barse v. State of Maharashtra,1983 2 SCC 96

be collected but such access has got to be controlled and regulated. In *Dharambir v. State of U.P*[14] the court directed the State Government to allow family members to visit the prisoners and for the prisoners, at least once a year, to visit their families, under guarded conditions.

3. **Rights against Inhuman Treatment:** Human Rights are part and parcel of Human Dignity. The Supreme Court of India in several cases has taken a serious note of the inhuman treatment on prisoners and has issued appropriate directions to the concerned authorities for safeguarding the rights of the prisoners. The Court observed that the treatment of a human being which offends human dignity, imposes avoidable torture and reduces the man to the level of a beast would certainly be arbitrary and can be questioned under Article 14.

In the case of Christian Community Welfare Council of India vs. Government of Maharashtra[15], it was held by the Bombay High Court that woman should not be arrested after sunset and before sunrise and only in the presence of lady constables. The Court directed the State Government to set up a Committee to formulate a comprehensive scheme for police accountability to human rights abuse and make special provisions for female detainees. This Right plays an important role in protecting the female prisoners from any sexual harassment and unforeseeable tortures.

Therefore, apart from these according to Mulla Committee following are also the list of rights of prisoners which include:

- Right to human dignity,
- Right to basic minimum needs such as drinking water, hygiene, medical care, clothing, bedding etc.,
- Right to communication with the outside world,
- Right to access to law, Right to meaningful and gainful employment and so on.

Recommendations by Justice Krishna Iyer:

There are various committees which have given several recommendations were one of National Expert Committee on Women Prisoners which runs under the chairpersonship of Justice Krishna Iyer appraised the situation of women in jails and made various recommendations.

Some of the important recommendations include:

- Women prisoners should be informed of their rights under the law.
- Only women constables should conduct searches on women prisoners.

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[14] Dharambir v. State of U.P, 2010 5 SCC 344

[15] Christian Community Welfare Council of India vs. Government of Maharashtra,1996(1) BOM CR 70

- Women doctors should do a medical check-up of women prisoners as soon as they are admitted to prison.
- Women prisoners should be allowed to contact their families and communicate with their lawyers, social workers and voluntary organizations.
- Women prisoners should be allowed to keep their children with them with a proper age restriction.
- Women should be provided with proper hygiene products like- sanitary pads, more number of clothes such that their health is taken care of and thus it would help to protect their health.
- Special prosecution officers should be available to present the case of women prisoners.

Other Recommendations:

1. The prisoners should be allowed to meet their parents, relatives such that this will help in his rehabilitation and after their release were they can face the outside world courageously casting aside the stigma attached to them on account of precognition. The periodical furlough granted to prisoners in India under the Prisons Act and the rules framed thereunder are intended to achieve this objective.
2. The women prisoners should be treated more freely and allowed to meet their children frequently. Particularly, the women who fall prey to sex offence should be treated with sympathy and their illegitimate children should be assured an upright life in the society. In the case of Francis Coralie Mullin v. The Administrator, Union Territory Delhi[16] it was held that the women prisoners should also be allowed to meet their sons and daughters more frequently, particularly the attitude in this regard should be more liberal in case of under trial prisoners[17].
3. Women offenders should be handled only by women police or prison officials. The idea of setting up separate women jails exclusively for women prisoners, however, does not seem to be compatible keeping in view the huge expenditure involved in the process. In the case of R.D. Upadhyaya v. State of Andra Pardesh and others,[18] the child born out of prisoner mothers their birthplace should not be recorded as â€˜prisonâ€™ on their Birth Certificate.
4. The undertrials, minors, recidivists and first offenders should be kept separated from each other. Similarly, political offenders who are not guilty

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[16] Francis Coralie Mullin v. The Administrator, Union Territory Delhi,1981 AIR 746, 1981 SCR (2) 516

[17] Francis Coralie Mullin v. Union Territory Delhi, AIR 1981 SC 746

[18] R.D. Upadhyaya v. State of Andra Pardesh and others, AIR 2006 SC 1946

of violence should also be kept separate and not be housed in the same premises in which other criminals are lodged. It is inhuman and unreasonable to throw young boys to sex-starved prisoners or to run mental jobs for hardened and affluent prisoners. The young prisoners should be separated from adults.

5. There is a need for the scientific classification of prisoners based on nature of the crime committed, age, sex, character and properties of the offender including his educational level and likely response to prison treatment[19].
6. The prison legislation should make provision for the remedy of compensation to prison who are wrongfully detained or suffer injuries due to callous or negligent acts of the prison personnel. It is gratifying to note that in recent decades the Supreme Court has shown deep concerns for prisoners right to justice and fair treatment and requires prison officials to initiate measures so that prisoners basic rights are not violated and they are not subjected to harassment[20] and inhuman conditions of living.

Conclusion

The prison is supposed to be a place meant for a reformatory purpose. However, the entire Purpose fails when the prisoners are denied the very rights that are fundamental to their being a human being. A few decades ago, prisoners were looked down upon and were considered to have forsaken all their rights. However, modern society recognizes the rights of a prisoner. Hence, a conviction for a crime does not reduce the person into a non-person, whose rights are subject to the whim of the prison administration and authorities. It is the need of the hour that we take positive steps to ensure that the basic human rights of prisoners are not infringed and that they live with dignity because human beings denying other human their basic rights does nothing but taking us right back to the era of cannibalism and war. To improve prison status it does not mean that prison life should be made easy, it means, it should be made humane and sensible. The functioning of judiciary reveals that it has exercised its powers in the most creative manner and devised new strategies to ensure the protection of Human Rights of the prisoners. Thus, mere words on a paper have never been enough. It is time that laws are implemented and given the chance to fulfil its purpose a peaceful society of equals.

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[19] Sunil Batra v. Delhi Administration, AIR 1978 SC 1675

[20] Sanjay Suri v. Delhi Administration 988, Cr LJ 705 (SC)

CORRUPTION AND ITS CAUSES IN INDIA – A STUDY WITH SPECIAL REFERENCE TO ANTI-CORRUPTION LAWS

Dr.T.Balaji*

Introduction

India, the largest democratic country in the world with a population of over 1300 million people, is the second-most populous country after China. Indian economy is one of the fastest-growing economies and is attracting huge investments from developed countries. India has become the 6th largest economy in the world[1]. Corruption has become a part of every walk of life in India.[2] There is a huge opinion on the public minds that the corruption is involved with the lower levels of investment. The Nation's progress is severely hampered by all-pervasive corruption. Weeding out corruption today is a major challenge before Indian society. To eradicate the evil of corruption, the Central Government has enacted Anti-Corruption Laws[3] to deal with the prevention of corruption and constituted commissions such as the Central Vigilance Commission (CVC), Central Bureau of Investigation (CBI) and Anti-Corruption Bureau (ACB) to enforce the Anti-Corruption Laws effectively.

In recent years fighting corruption in the grass root cause levels has become the key development of the Country. No doubt there are numerous laws to curb corruption and various anti-corruption agencies for implementing the anti-corruption policies and raising the awareness on corruption issues. The rampant corruption has corrosive effects on society. Evidence shows that corruption is going widespread in India, and the government's efforts to combat corruption and various measures have been evaluated as

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1 Maire Chene, *"Overview of Corruption and Anti-Corruption Efforts in India"* Available at, Transparency International. http://www.U4.no.

2 Era Sezehiya, Former Member of Parliament, Paper Presented at National seminar on *"All India Convention-Anti Corruption"*, Chennai, Aug 2008.

3 The Prevention of Corruption Act, 1947, Sections 161 to 165A of the Indian Penal Code, The Criminal Law Amendment Act, 1944, The Prevention of Corruption Act, 1988, Prevention of Money Laundering Act, 2002, and Right to Information Act, 2005.

unsatisfactory[4]. The evil of corruption is prevailing in all parts of life. It has become difficult to avoid this evil as it has entered into all dimensions of life. The comprehensive purpose of the research is to analyze and examine the provision of the Prevention of Corruption Act, 1988, for a better understanding of the problem of corruption and find ways to reduce this phenomenon. The main purpose of the research is to find out the possible solution and to give appropriate suggestions in this regard[5].

The scope of the present study is limited to the efforts taken by the Government of India in combating corruption. To acquire comprehensive perception, an effort is made to study the Prevention of Corruption Act, 1988, its relevance to contemporary Indian society, and examine the performance of the Institutional Mechanism of Anti-Corruption Agencies, like CVC, CBI, Lokpal, Lokayukta and Ombudsman in India. Further, the study covers the International Anti-Corruption Policies and Programmes and the steps taken by the International Institutions like World Bank, IMF, etc., and also to observe their policies and programs that can suit the Indian situation to prevent corruption[6].

Definition and Meaning of Corruption

A sense of fascination is evoked on seeing many historical practices of corruption and modern theories of regulation of economic behaviour. In recent days of business and commerce, corruption has been facing a devastation and crippling effect. The evil of corruption has been affecting human society from the earliest time. When corruption becomes entrenched, it can devastate the entire economic, political, and social fabric of a country. Corruption has a devastating long-term impact, and in the end, we all become victims. The origin of the evil of corruption has become a topic of consideration and worry in society at large and the mass media, in academic domains, amongst the persons of various walks of life. It has become a regular topic of debate between members of the legislature, representatives of people, politicians of different political parties, public servants, businessmen, labour communities, and students. Corruption emanates as a result of deficiencies in

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4 Wolfenson, *"Challenging Corruption in Asia: Case Studies and a Framework for Action"*, World Bank Publication, 2003.

5 Syed Umarhatbub, *"Public Rating of Corruption"*, The Indian Police Journal, Vol. Liv.2, April-June, 2007.

6 Kofi A. Annan, General Secretary, UNO, "United Nationals Convention Against Corruption" New York, 2004.

the present public administration structures as well as traditional, social, political, and other related elements. Also, the inefficiency of anti-corruption legislation and poor implementation of laws by the enforcement agencies has increased the vigor of this evil. Everyone must make it his or her best to prevent corruption from engulfing our great country. All countries have joined together in the United Nations General Assembly and have adopted an International Code of Conduct for Public Officials and a Declaration against Corruption and Bribery in International Commercial Transactions[7]

According to the World Bank, widespread corruption can cause the growth rate of a country than that of a similar country with less corruption. While corruption is a serious worldwide phenomenon, it is especially destructive in developing countries like India with their delicate economic situations[8].

Section 7 of the Prevention of Corruption Act, 1988 defines corruption as: "Whoever being or expecting to be a public servant, accepts or obtains, or agrees to accept, or attempts to obtain gratification whatever, other than legal remuneration as a motive or a reward or for bearing to do any official act or for showing or for bearing to show, in the exercise of his official functions favour or disfavour to any person with the Central or State Government or Parliament or Legislature of any State or with any public servant as such."

Social Justice and Corruption under Constitution of India

The United Nations broadly understands 'Social Justice' as "as the fair and compassionate distribution of the fruits of economic growth". India, being a democracy and welfare State, has incorporated the concept of Social Justice into its constitution. The concept of social justice also finds a 'place in the Universal Declaration of Human Rights. Social justice is a requirement of all human beings.

The Directive Principles of State Policy, as given under Part-IV of the constitution, are of great importance in the context of social justice. These principles are the aim and objectives of the State in governance. In *Air India Statutory Corporation v. United Labour Union,*[9] the judges of the Supreme

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7 UN General Assembly Resolution 58/4 of 31 October 2003.

8 CPI (Corruption Perception Index) Brochure-2015, (Transparency International, Berlin, Germany, 2015).

9 AIR 1997 SC 645.

Court have explained the concept of Article 38 as "The concept of 'social justice' consists of diverse principles essential for the orderly growth and development of the personality of every citizen. 'Social justice' is then an integral part of justice in the generic sense. Justice is the genus, of which social justice is one of its species." Not only the Article but the whole body of the Directive Principles of State Policy furthers the object of social justice.

The concept of social justice is an inherent characteristic of a welfare State. In a welfare State, there is a great emphasis on social justice as it can be an effective tool in removing the evil of inequality. It is the duty of a welfare State to remove discrimination into the income of its citizens. The equality of opportunities and equal distribution of wealth is the paramount object. The evil of corruption poses a hindrance to the noble objective of social justice. Corruption is not a crime against an individual only, but it is a crime against State and humanity also. Thus, for attaining the fruit of social justice, we have to eliminate the evil of corruption.

It is a common belief that democracy is more effective in controlling the evil of corruption because of the presence of transparency and sound anti-corruption legislation. This is mainly because every political party has to face elections, and it creates a sense of accountability because of political competition. 'In democratic systems, competitors for office have an incentive to discover and publicize the incumbent's misuse of office whenever an election beckons.'[10] As we have witnessed into the last General elections of 2014; corruption was one of the main agenda of the political parties, and the previous ruling party was thrown out of power mainly because of serious allegations of corruption on party-members, ministers, and even on the Prime Minister (e.g., Coalblock allocation scam and 2-G spectrum scam).

On the other hand, the corruption affects the income inequality in an inverted U-shaped way; that is, inequality is low when levels of corruption are high or low, but inequality is high when corruption is intermediate.[11] In this way, we can say that corruption affects income inequality and increases the gap between rich and poor.

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[10] Corruption in India: Nature, Causes, Consequences and Cure, OPSR, Journal of Humanities and Social Science, Vol. 18, Issue 5, Nov. - Dec. 2013, pp. 20-24, www.iosrjournals.org Last Visited on 10th Aug, 2020.

[11] Source: www.transparencyinternational-cpi-2020 Last Visited on 10th Aug, 2020

Corruption as a Source of Inequality

There is a deep relation between corruption and inequality. The corruption restricts the eligible persons from taking advantage of their abilities. The eligible persons are made to sit outside the workplace because of bribery and malpractices among the officials. They are not able to come to the mainstream of the nation because some other persons are eating their share fraudulently. The nexus of political leaders and public servants cost the nation badly. On the one hand, it is pushing the nation backward by appointing ineligible or less eligible persons to sit on important posts; on the other hand, there is a disappointment for the eligible and efficient candidates. All this has resulted in inequality in society. The situation is so alarming that it has resulted in a big gap between haves and have-nots.

Corruption in India

According to the 1960 Report of Santhanam's Committee of Prevention of Corruption, 1964, the term "corruption includes all improper or selfish exercise of power and influence attached to a public office or to a special position one occupies in public life[12]."

According to the Oxford Dictionary - "perversion of the destruction of integrity in discharge of public duties by bribery or favour is called corruption." Webster's Dictionary defines corruption as "inducement to wrong by improper or unlawful means as bribery." The most popular and simplest definition of corruption is given by the world bank. According to this definition, corruption is that it is the "abuse of public power for private benefit." From this definition, it should not be concluded that corruption cannot exist within private sector activities. Especially in large private enterprises, this phenomenon exists, as in procurement or even in hiring. It also exists in private activities regulated by the government.[13]

Political corruption affects society as a whole. People elect the representatives and choose political parties with the expectation that they rule to protect and safeguard the interest of the society. By electing the government, people allow getting access to the public resources and authority to take decisions that impact the lives of the people. After being given a

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[12] http://phiiair.ph/pubiicationiindex.php/ijgc/articie/view/230, Last visited on 07th July 2020.

[13] http://wwwl.worldbank.org/publicsector/anticorruptJindex.cfm., Last visited on 12th July 2020.

privileged position of ruling to them, i.e., politicians acting out of greed, they cause immense damage to the interest of the society ignoring the fact that they are also part of the society. In politics, corruption undermines democracy and good governance by flouting or even subverting formal processes. Corruption in elections and the legislature reduces accountability and distorts representation in policy making; corruption in the judiciary compromises the rule of law, and corruption in public administration results in the inefficient provision of services.

In recent years so many major scandals involving high-level public officials have shaken the Indian public services. These scandals suggest that corruption has become a pervasive aspect of Indian political and bureaucratic system. Some of the major scams are following-

1. Coal Allotment Scam (Cost - 186000 Crores)
2. 2 G Spectrum Scam (Cost - 176000 Crores)
3. Commonwealth Games (CWG) Scam (Cost -70000 Crores)
4. Mega black money laundering Scam (Cost -70000 Crores)
5. Adarsh Housing Scam (Cost - 18978 Crores)
6. Stamp Paper Scam (Cost - 20000 Crores)
7. Bioforce Scam (Cost - 400 Million)
8. Fodder Scam (Cost - 950 Crores)
9. Hawala Scam (Cost - 8000 Crores)
10. Satyam Scam (Cost-14000 Crores)
11. Stock Market Scam (Cost - 3500 Crores)
12. Madhu Koda Scam (Cost - 4000 Crores)

Transparency International publishes annually the Corruption Perception Index (CPI) by ranking countries on their perceived levels of corruption as determined by expert assessments and opinion surveys. Corruption is the misuse of public power for private benefit.[14] Least Developed Countries and Developing Countries had the greatest vulnerability to corruption. In contrast, Developed Countries had lower corruption.[15] India

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[14] N. Vittal, *"Support of Vigilance Systems in Government to Citizens"* Effort to Fight Corruption", (Paper presented at the Workshop of MKSS, Jaipur on 07.0 1.2002. http://www.mkssindia.org/writings/mkssandrti/writings 150-2/, Last visited on 12th July 2020.

[15] Uslaner, *"The Bulging Pocket and the Rule of Law"*, Ch. (1) "Corruption: The Basic Story" - http://www.gvpt. umd.edu/uslaner/uslanerbulgingpocketchl.pdf,. Last visited on 17th July 2020.

has shown some improvement in addressing corruption this year, ranking 85th among 175 countries as against 94th last year, as per graft watchdog Transparency International India (TII). Denmark retained its position as the least corrupt country in 2014 with a score of 92nd while North Korea and Somalia shared the last place, scoring just eighth it said. In India's neighborhood, China moved to 100th place, down from 80th last year, while Pakistan and Nepal were at 126th position. Bangladesh was 145th and Bhutan 30th in the ranking. Sri Lanka was ranked 85th with India.

Causes of Corruption

Corruption weakens the State and its ability to promote development and social justice. It is regressive in the sense that its costs and negative economic impact tend to fall more heavily on small enterprises and individuals in a weak economic position. Corruption undermines development by distorting the rule of law and weakening the institutional foundation on which economic growth depends. Corruption can be seen to be "... one of the greatest enemies of development."[16]

Social Causes

- Nepotism
- Communalism and Religion
- Illiteracy
- Social change - Evil Social Practices: Evil social practices also promote Corruption. One major social cause that promotes corruption is the dowry system. Dowry system is one of the social roots of corruption in our country.[17]
- Modernization: modernization leads to changes in the values of a society; therefore, some behaviour that was traditionally accepted may become unacceptable and therefore corrupt; modernization creates new sources of wealth to which the political structure has access; therefore, opportunities for corruption are created.
- Urbanization
- Costly Education System

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[16] Puja Mondal, "Casteism: Meaning, Causes, Solution and Suggestions", http://www.yourarticlelibrary. com /caste/casteism-meaning-causes-solution-and-suggestion/34994/, Last visited on 16th July 2020.

[17] Deepak, "Corruption the Deadliest Evil in the Society", p. 118, http://www.exposeknowledge.com/kb/8051-curroption-deadliest-evil-society.aspx. Last visited on 18th July 2020.

- (viii) Lower Punishment: Penalties and punishments are negligible for both givers and takers. Legal fairness is not the same thing as corruption, even though they are strongly related. Corruption may be less common in countries with their legal systems.[18]
- Lack of Morality and Ethics
- **Casteism:** Casteism has become an instrument in the hands of political leaders. Many political leaders, during elections, try to procure votes on a communal and caste basis, rather than their capacities and capabilities. This results in the election of under-serving candidates, who do not hesitate to promote their caste interest at the cost of the common good. Thus, casteism proves to be a hindrance to democracy.[19]

Economic Causes

- Low Salaries: Inadequate salaries constitute an open invitation to corruption.

ii. The disparity in Economic Status
iii. Depreciation in the value of the currency - Low Income Per Capita
iv. The emergence of Consumerism Poverty and Corruption
v. The rise in Prices and Scarcity of Goods

Administrative Causes

i) **Discretionary Power:** Corruption needs only two prerequisites- first, there must be a predisposition on the part of an individual to accept gratification, and second, he must have some discretionary power to affect some sections of the public. When both these factors combine, a corruption most prevails. No wonder that Independent India is a fertile ground for corruption.[20]

ii) **Red-Tapism:** Red tape is the set of rules and regulations that private agents are obliged to comply with in order to engage in entrepreneurial activity. Corruption is the payment of bribes to public officials to circumvent red-tapism.

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[18] Daniel Treisman, *'The Causes of Corruption: A Cross-National Study'*, 76 (3) JPE 399-457 (2000).

[19] Hongyi Li, Xu Colin et.al., *"Corruption, Income Distribution, and Growth"* 12 (2) E&P 155-181 (2000).

[20] http://lawmantra.co. in/adequacy-of-legal-and-regulatory- framework -to-combat - corruption- in India. Last visited on 25th July, 2020.

Indian Legislations against Corruption

Indian Penal Code

A plethora of Laws has been enacted in India to combat corruption. These laws include Pre and Post Constitutional Laws and also Central and State Laws. Though there is no dearth of laws in India to crack corruption, the real will to curb corruption is lacking with the state machinery and Political leaders. The Indian Penal Code (IPC) 1860 is a comprehensive code intended to cover all substantive aspects of criminal law.

Public Servant: IPC defines "public servant" as a government employee, officers in the military, navy or air force; police, judges, officers of Court of Justice, and any local authority established by a central or state Act. (sec. 21).

Criminal Conspiracy: Criminal conspiracy means an agreement between two or more persons to do an illegal act or to do a legal act by illegal means. In other words, a joint evil intent is necessary to constitute crimes. The physical act need not takes place. The accomplishment of the crime need not be achieved or even attempted. It is only when two agree to carry a plot into effect, that the very plot becomes an act in itself and punishable in law.

Criminal Misappropriation and Criminal Breach of Trust

Misappropriation means to take possession of the property and to put it unauthorized or wrongful use. If any person dishonestly misappropriated or converts any movable property of another person to his use, such person shall be punishable with imprisonment of either description for a term which may extend to two years, or with fine, or with both.[21] A person is said to have

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[21] Section 403 of IPC - Dishonest misappropriation of property - Whoever dishonestly misappropriates or converts to his own use any movable property, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

Explanation 1 - A dishonest misappropriation for a time only is a misappropriation with the meaning of this section.

Explanation 2 - A person who finds property not in the possession of any other person, and takes such property for the purpose of protecting it for, or of restoring it to, the owner, does not take or misappropriate it dishonestly, and is not guilty of an offence; but he is guilty of the offence above defined, if he appropriates it to his own use, when he knows or has the means of discovering the owner, or before he has used reasonable means to discover and give notice to the owner and has kept the property a reasonable time to enable the owner to claim it. What are

committed Criminal Breach of Trust when he dishonestly misappropriated or coverts to his own or uses or disposes in violation of any law the property which is entrusted to him or over which he has been given control or any legal contract, express or implied, which he has made touching the discharge of such trust, or willfully suffers any other person so to do.[22] Such person shall

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reasonable means or what is a reasonable time in such a case, is a question of fact. It is not necessary that the finder should know who is the owner of the property, or that any particular person is the owner of it; it is sufficient if, at the time of appropriating it, he does not believe it to be his own property, or in good faith believe that the real owner cannot be found.

[22] Section 405 of IPC - Criminal breach of trust - Whoever, being in any manner entrusted with property, or with any dominion over property, dishonestly misappropriates or converts to his own use that property, or dishonestly uses or disposes of that property in violation of any direction of law prescribing the mode in which such trust is to be discharged, or of any legal contract, express or implied, which he has made touching the discharge of such trust, or wilfully suffers any other person so to do, commits "criminal breach of trust".

Explanation 1 - A person, being an employer 3 [of an establishment whether exempted under section 17 of the Employees' Provident Funds and Miscellaneous Provisions Act, 1952 (19 of 1952) or not] who deducts the employee's contribution from the wages payable to the employee for credit to a Provident Fund or Family Pension Fund established by any law for the time being in force, shall be deemed to have been entrusted with the amount of the contribution so deducted by him and if he makes default in the payment of such contribution to the said Fund in violation of the said law, shall be deemed to have dishonestly used the amount of the said contribution in violation of a direction of law as aforesaid.

Explanation 2 - A person, being an employer, who deducts the employees' contribution from the wages payable to the employee for credit to the Employees' State Insurance Fund held and administered by the Employees' State Insurance Corporation established under the Employees' State Insurance Act, 1948 (34 of 1948), shall be deemed to have been entrusted with the amount of the contribution so deducted by him and if he makes default in the payment of such contribution to the said Fund in violation of the said Act, shall be deemed to have dishonestly used the amount of the said contribution in violation of a direction of law as aforesaid.

be punishable with imprisonment of either description for a term which may extend to three years, or with fine, or with both.[23]

Criminal Law Amendment Ordinance, 1944

The main object of the Criminal Law Amendment Ordinance, 1944 is to protect Government money and property believed to have been obtained by the persons against whom cases are brought either of embezzling the Government money or property or having stolen Government property or of obtaining Government property by false pretenses.

Prevention of Corruption Act, 1947

The Prevention of Corruption Act, 1947, is the first special legislation in India dealing with the prevention of corruption. However, it did not redefine nor expand the definition of offenses related to corruption already existing in IPC. Similarly, it has adopted the same definition of "Public Servant" as in the IPC[24]. However, this Act defined a new offense "criminal misconduct in the discharge of official duty" - for which enhanced punishment (minimum one year to maximum seven years) was stipulated. In order to shift the burden of proof in some instances to the accused, it was provided that whenever it was proved that a public servant had accepted any gratification, it shall be presumed that the public servant accepted such a gratification as a motive or reward under Sections 161,164 and 165 without the permission of the authority competent to remove the charged public servant. The Act also provided that the statement by the bribe-giver would not subject him to protection.

The Prevention of Corruption Act, 1988

The Prevention of Corruption Act, 1988 was enacted with the object to amend the existing anti-corruption laws with a view to making them more effective by extending the scope and ambit of the definition of "public servant" and to bring to within its sweep each and every person who held an office by virtue of which he was required to perform any public duty, and it continues to be the mainstay of the anti-corruption laws in India. Some important aspects of the Act are :

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[23] Section 406 of IPC - Punishment for criminal breach of trust - Whoever commits criminal breach of trust shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

[24] (Ordinance No. XXXVIII of 1944) A Ordinance to prevent the disposal or concealment of property procured by means of certain offences.

a) Sections 161 to 165 of IPC dealing with Corruption has been repealed from the IPC and brought under Chapter III of the Prevention of Corruption Act, 1988.
b) All the offenses falling under this Act shall be tried by the Special Judges.
c) For the expeditious disposal of the cases, Sections 243, 309, 317, and 397 of Cr.P.C have been amended.
d) If a public servant takes gratification other than his legal remuneration in respect of an official act or to influence public servants is liable to a minimum punishment of six months and maximum punishment of five years and fine. The Act also penalizes a public servant for taking gratification to influence the public by illegal means and for exercising his influence with a public servant.
e) If a public servant accepts a valuable thing without paying for it or paying inadequately from a person with whom he is involved in a business transaction in his official capacity, he shall be penalized with a minimum punishment of six months and maximum punishment of five years and fine.
f) It is necessary to obtain prior sanction from the central or state government in order to prosecute a public servant.[25]

The Benami Transactions (Prohibition) Act, 1988

Benami purchases are purchases in the false name of another person who does not pay the consideration but only lands his name and real title vests in another person who purchased the property, and he is the beneficial owner. The objectives of the Act are i) to prohibit Benami transactions and ii) the right to recover property held by Benami. This Act came into force on 19th May 1988.

Prevention of Money Laundering Act, 2002

The Prevention of Money Laundering Act, 2002 (PMLA), forms the core of the legal framework put in place by India to combat money laundering.

Institutional Agencies to Prevent Corruption

Mere enacting Anti-Corruption Laws does not prevent corruption unless such laws provide a mechanism or machinery to prevent corruption. The strong and perfectly framed mechanism is required to enforce and

[25] Section 2 of The Prevention of Corruption Act, 1947 – For the purpose of this Act, 'Public Servant', means a public servant as defined in Sec. 21 of the IPC.

implement these laws effectively. Hence, certain Anti-Corruption Agencies Namely Central Vigilance Commission (CVC), Central Bureau of Investigation (CBI), Anti-Corruption Bureau (ACB), Comptroller and Auditor General (CAG), Lok Pal, Lokayukta and Upa-Lokayukta are established to prevent corruption and enforce the Anti-Corruption Laws. The Administrative Vigilance Division of the Department of Personnel and Training is the Nodal Agency for dealing with Vigilance and anti-corruption. Its tasks, *among other things*, are to oversee and provide necessary directions to the Government's programme of maintenance of discipline and eradication of corruption from the public services. In pursuance of the recommendations made by the Committee on Prevention of Corruption, popularly known as the Santhanam Committee, the Central Vigilance Commission was set up by the Government of India.

At the federal level, key institutions were established which include, the Central Vigilance Commission (CVC), The Central Bureau of Investigation (CBI), The Office of the Comptroller and Auditor General (C&AG) and the State Level Anti-Corruption Bureaus or Agencies (ACB) of each State are created to combat the corruption in India. Thus, three main authorities involved in inquiring, investigating and prosecuting corruption cases are the Central Vigilance Commission (CVC), the Central Bureau of Investigation (CBI) and the State Anti-Corruption Bureau (ACB).

Cases related to money laundering by public servants are investigated and prosecuted by the Directorate of Enforcement and the Financial Intelligence Unit, which are under the Ministry of Finance. The CBI and state ACBs investigate cases related to corruption under the Prevention of Corruption Act, 1988 and the Indian Penal Code, 1860. The CBI's jurisdiction is the central government and Union Territories while the State ACBs investigate cases within the States. States also can refer cases to the CBI.

Anti-Corruptions Agencies to Combat Correction

Corruption has been known as a decaying force to society, and States have taken counter measures against such deceitful practices. Charges and punishments for corruption could be traced in the Egyptian, Babylonian, Hebrew, Chinese, Greek, and Roman civilization, [26] Anti-corruption strategies

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[26] Gill. S.S, *"Pathology of Corruption xiii"*, (The Roman Empire provides some of the most startling examples of corruption. A senator guilty of embezzlement was fined the amount of money he had gained from his position and governors

are proposed at the international, regional, national, and local levels. In India, Anti-corruption institutions are established under the National and State level. It is important to point out that many of these mechanisms are supported by international agencies such as the World Bank, OECD, UNDP, UN CAC Transparency International, and regional development agencies in Europe, Asia, Latin America, and Africa[27]. In many developing countries, the need to find alternative mechanisms to the conventional law enforcement agencies may be over-extended in their capacity or may themselves be part of a corrupt system[28]. It has resulted in the creation of anti-corruption agencies as specialized bodies to spearhead anti-corruption strategies. These agencies have been created as the enforcement bodies of anti-corruption legislation, with specific powers to detect and deter corruption.

- **Central Vigilance Commission (CVC)**
- **Central Bureau of Investigation (CBI)**

Functions of CBI

The CBI is the premier investigating police agency in India. It is an elite force playing a major role in the preservation of values in public life and in ensuring the health of the national economy[29] It is also the nodal police agency in India which coordinates investigation on behalf of Interpol Member countries. The services of its investigating officers are sough for all major investigations in the country. It was constituted under the following six heads:

i) Investigation of corruption cases
ii) Technical Division
iii) Crime Records and Statistics Division
iv) Research Division
v) Legal and General Division
vi) Administrative Division.

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extracted money from this provinces and used their loot to pay off the judges they would stand in front of in the near future.)1998.

[27] Lanseth P, Stapenhurst R. and Pope J. *"The role of National Integrity system in fighting Corruption"* EDI Working Papers, Washington D.C: World Bank.2000.

[28] Government of India res. no. 24/7/64-avd, Feb. 11, 1964 (establishing the Central Vigilance Commission); Anjali Nirmal, "Role and Functioning of Central Police Organizations" 43 (1992).

[29] Delhi Special Police Establishment Act, No. 25 of 1946, Sec. 2.

- **Comptroller and Auditor General (CAG)**

Role of Indian Judiciary in Preventing Corruption

In a democratic country like India, the role of the judiciary is significant. The Judiciary administers justice according to law. It is required to promote justice in the adjudicatory process. Judiciary can promote social justice through its judgments; the role of the judiciary is crucial. The judiciary is one of the three pillars of the modern democratic nation-state and is essential to the process of check and balance so fundamental to the way societies such as ours are meant to operate and function. A well-functioning justice system is crucial to address corruption effectively, which in turn is important for development.[30]

In Coalgate Scam[31] case The Supreme Court cancelled 214 licenses of 218 coal mines and asked the mine owners to wind up their activities and vacate the lands within 6 months and spared only four licenses granted in favor of Coal India Limited (CIL) and National Thermal Power Corporation (NTPC) and directed the licensee to pay Rs.295 per tonne of coal they extract. They also have to pay the same amount per tonne for the coal they have already extracted from the blocks. In a landmark verdict during August 2014, the apex court had said that licenses to the blocks were illegal and arbitrary, and a transparent process for their bids was not followed.

In the 2G Spectrum case, the Supreme Court issued several directions regarding the effective investigation into the allegations made against certain ministers and other bureaucrats. In *Center for PIL & Others v. Union of India & Others*[32] the court deemed it proper to issue the following directions:

(i) The CBI shall conduct a thorough investigation into various issues highlighted in the report of the Central Vigilance Commission (CVC), which was forwarded to the Director, CBI vide letter dated 12.10.2009. The CBI should also probe how licenses were granted to a large *number of ineligible applicants and who was responsible for the same and why the Telecom Regulatory Authority of India (TRAI) and the Department of Telecommunication (DoT) did not take action against those licensees who sold their stakes or equities for many thousand crores and also

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30 http://www.prsindia.org/administrator/uploads/general/1302844978_PRS%20 Note%20on% 20corruption%20laws. pdf, Last visited on 03rd Aug, 2020.

31 2014 (9) SCC 614

32 2012 (3) SCC 1

against those who failed to fulfill rollout obligations and comply with other conditions of license.

(ii) The CBI shall investigate without being influenced by any functionary, agency, or instrumentality of the State and irrespective of the position, rank, or status of the person to be investigated or probed.

The court further directed that the progress reports based on the investigations conducted by the CBI and the Enforcement Directorate shall be produced before the Court in sealed envelopes. This court direction resulted in a successful cancellation of 122 licenses illegally granted in the *Centre for Public Interest Litigation and Others v. Union of India* and *Subramanian Swamy v. Union of India.*[33]

In *Lalu Prasad Yadav v. CBI*[34], which is known as "Bihar Fodder Scam" the Supreme Court, taking into consideration the seriousness of the charges alleged and the maximum sentence of imprisonment that could be imposed including the fact that the appellants were in jail for a period more than six months as on the date of passing of the order, was of the view that the further detention of the appellants as pre-trial prisoners would not serve any purpose.

In *Dr Subramanian Swamy v. Director, CBI & Another*[35]on 6, May 2014 the two-Judge Bench of this Court observed that "Corruption in society is required to be detected and eradicated at the earliest as it shakes "the socio-economic-political system in an otherwise healthy, wealthy, effective and vibrating society". Liberty cannot last long unless the State can eradicate corruption from public life. Corruption is a bigger threat than an external threat to civil society as it corrodes the vitals of our polity and society. Corruption is instrumental in not proper implementation and enforcement of policies adopted by the Government. Thus, it is not merely a fringe issue but a subject-matter of grave concern and requires to be decisively dealt with."

Conclusion

In India, corruption is a result of the nexus between bureaucracy, politics and criminals. Corruption makes our image very poor at the international market and leads to loss of overseas opportunities and

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33 2012 (3) SCC 1.

34 2006 (6) SCC 661

35 2005 (2) SCC 317.

investment. Although India's economy stands tall and firm, it has not realized its true potential as corruption has, in the present circumstances, inhibits and undermines not only the economic growth but also create hurdles in the smooth functioning of democracy. Corruption as a social menace has made the suspect-able image of our country at the global level. There are various bodies in India for implementing anti-corruption policies and raising awareness programmes on corruption issues. At the Central level, key institutions include the *'Central Vigilance Commission', 'Central Bureau of Investigation'* and the office of the *'Controller and Auditor General'*. At the State level, Local Anti-Corruption Bureaus have been set up to look after the corruption issues are available.

India is equipped with many laws to fight against corruption in the public sector. The acts pertaining to corruption and corrupt practices by public servants are dealt in a comprehensive manner by The Prevention of Corruption Act 1988. Apart from the act, there are various other laws relating to tracking, seizing, and confiscating proceeds of such crimes, both inside and outside the country. India has signed mutual legal assistance and extradition treaties with 20 and 25 countries respectively to facilitate international co-operation in the fight against corruption. For achieving good governance in India Corruption is considered as an impediment which is more significant. Though there are mixed results with criminal law and public policy approaches, no effort has been taken to develop a human rights approach to corruption. The right to information in India should include the right to transparency and the right to corruption-free governance. This integral approach of handling corruption will ensure that the political and bureaucratic machinery in India is accountable to its people.

ALL ABOUT WITCH-HUNTING: A BRIEF STUDY

-Dr Anitha K N*

Introduction

The concept of witch hunting has been prevalent in all the times be it primitive, medieval and modern. One can witness the concept of witch hunting around the globe. Witch-hunting is like an infectious disease and is slowly spreading to newer areas and solutions will have to be found to eradicate this evil practice.[1] Those who accuse women of practising witchcraft accused women for natural calamities, and even for the death of a healthy person. Accusing people thought that killing them is the only solution to overcome all this. Further it was seen that incidents which could not be answered was thought to be the act of women who were having supernatural power and gradually this concept was bedded in the society and which still has mark able effect in society.

Witch-Hunting in India

India is a land where the women are treated as God. Killing women is considered as sin in India. On the other hand we have seen always the women are doubted as doing witchcraft/magic and are killed for the same. This practice of killing is not new for Indian society rather it has its deep roots in history. Initially when the concept of witch was discussed people thought of ugly women with a broom who can fly, who can disappear. Now in a changing scenario people think that she is the one who acquire supernatural powers and are indulged in evil practices which are bad omen. There is also a belief that to improve their power they sacrifice and offer the dead bodies/blood of the healthy person especially on Amavase/full moon day. They are called in many names such as *'Chudail', 'Dayan', Tohni'*, etc. Therefore Witch Hunting is a process of killing these people in order to protect the society from being harmed by them. In name of witch hunting people kill innocent women, rape them, to acquire their property and some time it is being used as a tool for vengeance. Witch hunting is stigmatization of specific groups of people, which mostly contains widowed women, women who are childless, old couples, women of lower caste. Other than this many are targeted due to local politics. It has been witnessed in tribal and rural areas that if wild spread diseases occur or famine occurs which causes death of animals as well as human the allegation develops on the most vulnerable

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1 G. Foxcroft, Witchcraft Accusations: A Protection Concern for UNHCR and the Wider Humanitarian Community, available at https://www.crin.org/en/docs/Stepping_stones_witchcraft.pdf, seen on 06/11/2020.

people of the society for witch craft and then violence. The practice is said to have emanated hundreds of years ago in the Morigaon district of Assam which is famously called 'The Indian capital of black magic' and is the abode of people who want to learn witchcraft. The practice is a customary one in India and is prevalent in rural isolated areas especially among the tribal population. The incidents of witch hunting are prominent in Assam, Bihar, Chhattisgarh, Gujarat, Haryana, Jharkhand, Madhya Pradesh, Maharashtra, Orissa, Rajasthan, Uttar Pradesh and West Bengal. Witches in the Indian subcontinent are referred to as *Chudail* or *Chudel* . In many places they are also referred to as *Daayan*. A Chudail is an *Indian witch* or *a female ghost* and is believed to arise from the death of a woman caused due to some mishaps. There is a lot of variation in the Indian witch stories, all having their unique reasonings and fate.

Witches can usually be classified into three broad categories. These types are enunciated as under- The first one is the "neighbourhood witch" or "social witch": a witch who has some sort of rivalry with the neighbouring people or the people living in the vicinity, curses the neighbours following that conflict. In other words, these are the result of neighbourhood tensions. The Second one is the "magical" or "sorcerer" witch: a professional healer, sorcerer, seer or midwife, or a person who has through magic increased her fortune to the perceived detriment of a neighbouring household; due to neighbourly or community rivalries and the ambiguity between positive and negative magic, such individuals can be labelled as witches and the last one is the "supernatural" or "night" witch: these are the witches about whom a primary thought of evil nature comes in our minds, primarily associated with visions and dreams, and in many parts of India and the rest of the world supernatural witches became an ideology explaining calamities that befell entire communities.

Types of Witch-Hunting Attacks:

Witch-hunting can be classified into two categories viz., calculated and surprise. In the case of calculated attacks, gender relationship between the victim and accused plays an important role in the selection of target. Such attacks will be normally pre-planned as a means to take revenge. In case of surprise attacks, the women or her family members will be unaware of the Accusations. The attack happens randomly without any instigation in the form

of prior conflict or any history of witchcraft accusation. This kind of attack will be more serious in nature.[2]

Laws Concerning Witch-Hunts: An Analysis

India has a very long history of Witch-hunts since the medieval age and very much prevalent among Adivasis. The British tried to ban the persecution in the then states of Gujarat, Rajasthan and Chhotanagpur in the 1840s-1850.[3] They also took a few administrative steps but the result was contrary to their intentions. There was a rise in the Witch-hunt cases and this was also seen as a staunch rebellion against the British Rule. Since the post-independence era, there have been no special laws or national legislations which penalize witch-hunting practices. There is no specific and particular national level legislation that penalises Witch hunting. The reason that is often cited for it is that the Indian Penal Code,1860 itself provides for the punishment of offences which are committed in the processes related to Witch-hunting. The Indian Penal Code provides a punishment of up to one year in prison and/ or a fine of up to 1,000 rupees for "voluntarily causing hurt".[4] This penalty is the same for slapping another person as it for beating and torturing an accused witch.[5] Most often Section 323 is used to prosecute the perpetrators of witch hunts.[6] Elsewhere, the Indian Penal Code criminalizes murder and provides a penalty of death or life imprisonment as well as a fine. [7]Section 354 imposes a penalty of up to two years in prison for "whoever assaults or uses criminal force to any women, intending to outrage or knowing it to be likely that he will thereby outrage her modesty. [8]In the case of the perpetrators accusing women of witchcraft so that he may obtain her property, Section 382 provides a ten year sentence for "whoever commits theft, having made preparation for causing death, or hurt, or restrain in order to the committing of theft or in order to the retaining of property taken by

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2 Choudhuri S (2008), Women as Easy Scapegoats: Witchcraft Acccusations and Women as Targets in Tea Plan tations of India, Violence Against Women, Vol.18 (10), p 1213-1234

3 S. Sinha, Witch-Hunts, Adivasis, and the Uprising in Chhotanagpur, 42 (Economic and Political Weekly) 19, (12/05/2007).

4 S. 323, Indian Penal Code, 1860.

5 S. Saxena, Recourse Rare for Witch Hunt Victims in India, Women's eNews, available at https://womensenews.org/2007/07/recourse-rare-witch-hunt-victims-in-india, last seen on 20/12/2017.

6 *Ibid*

7 S. 300 and S. 302, Indian Penal Code, 1860.

8 S. 354, Indian Penal Code 1860.

such theft". [9]Other Penal Code provisions that are relevant to crimes committed against supposed witches relate to wrongful restraint and confinement,[26] [10]causing "grievous hurt",[11] kidnapping and abduction,[12] rape,[13] and defamation.[14] The increasing graph of crimes against women under the pretext of them suspected of being witches has compelled some states in India to formulate necessary legislation against this appalling practice. Though Bihar is one of the most backward state in India, it was the first state in India to pass a law against witch hunting in the year 1999, which was named "Prevention of Witch (Dayan) Practices Act." The law criminalizes "intentionally or inadvertently abetting, conspiring, aiding and instigating the identification of a woman as a witch leading to her mental and physical torture and humiliation". A person who identifies a woman as a witch can be imprisoned for three months and/or fined 1,000 rupees, and a person who causes a woman physical or mental torture by naming her a witch can be imprisoned for six months and/or fined 2,000 rupees.[31] [15]The Act also prohibits any harm to a woman in an attempt to "cure" her; the penalty for such an act is one year in prison and/or a fine of 2,000 rupees.[16] But this is very important to note that instead of being more rigorous against the practice the laid down punishments and fines are far less than those under the IPC for corresponding offences. Jharkhand followed the Bihar model and established "Anti Witchcraft Act" in 2001 to protect women from inhuman treatment as well to provide victim a legal recourse to abuse. Basically Section 3, 4, 5 and 6 of the concerned Act talks about the punishment which will be granted if any one accuse someone of being a witch, tries to cure the witch and any damages are caused to them. Whereas Section 7 states the procedure for trial. Chhattisgarh government enacted the "Chhattisgarh Tonahi Pratadna Nivaran Act, 2005", to protect the people from atrocities in the name of Witch-Hunt. It provides an imprisonment for three years term for a person who accuses a woman of being a 'Tonahi' or 'Dayan' and five years' imprisonment to

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9 S. 382, Indian Penal Code 1860.

10 S. 339-48, Indian Penal Code 1860.

11 S. 320 & 322, Indian Penal Code 1860.

12 S. 359-69, Indian Penal Code 1860.

13 S. 375-6, Indian Penal Code 1860.

14 S. 499-501,Indian Penal Code 1860.

15 The Prevention of Witch (Daain) Practices Act, 1999.

16 National Commission for Women, 89, A SITUATIONAL ANALYSIS OF WOMEN AND GIRLS IN JHARKHAND, available at http;//ncw.nic.in/pdfreports/Gender%20Profile-Jharkhand.pdf, last seen on 12/12/2017.

anyone who causes physical harm to such woman. Odisha government enacted the Odisha Prevention of Witch-hunting Act, 2013 which became enforceable in February 2014. This Act inter alia empowers the government to organise various awareness programmes against superstition and witch-hunting to make the law enforcement agencies as well as the society capable enough to put a pause over the rampant practice. Rajasthan Government enacted the "The Rajasthan Prevention of Witch-Hunting Act, 2015", to provide for adequate measures to tackle the menace of witch-hunting and to prevent the practice of witch-craft in the State. It is the most stringent law enacted against this menace in the country. A person who commits the grave crime of witch-hunting shall be punishable with rigorous imprisonment for a term which shall not be less than one year but which may extend to five years or with fine which shall not be less than fifty thousand rupees or with both. The Assam Assembly has passed a The Assam Witch Hunting (Prohibition, Prevention and Protection) Bill in 2015. However this bill has been referred back by the Ministry of Home Affairs for review. This bill prescribes the most rigorous punishments for witch-hunting and witchcraft and any acts incidental thereto. The punishment for leading an individual to committing suicide after intimidating, stigmatising, defaming and accusing them as a witch may be extended to life imprisonment, along with a fine of up to Rs 5 lakh. It also has provisions for imprisonment up to seven years, along with a fine of up to Rs 5 lakh, for calling a person a witch. The bill also talks about special courts to deal with the issue and the fine collected will be given to the victim as compensation.

Judiciary on Witch-Hunt:

The Gauhati High Court observed that witch-hunting is a socio-legal problem and needs to be curbed soon.[17] The Court noted that in the North-Eastern states, some people, mostly elderly women, are branded as witches and thereafter they are subjected to severe abuse in the name of getting rid of the evil supposed to be in them. Terming it a social menace, the Bench observed: "Witch hunting as a phenomenon is not only confined to the State of Assam; it has affected large parts of the country. It is rooted in flawed quasi-religious beliefs, antiquated socio-cultural traditions blended with extreme superstitions practices." The court also termed the act as one of the worst forms of Human Rights violations.[18]Several cases have indicated the courts' willingness to punish those who injure and kill people in the name of

[17] *Ibid.*
[18] *Ibid.*

witch-hunts, whereas in a few the superstitious belief because of which the offence was committed has been the mitigating factor in giving the sentence. The court held the defendants' superstitious belief as a mitigating factor. The court said, "the defendant's belief that he was morally justified to have committed the offence under the influence of extreme mental and emotional disturbance and also superstitious belief that he was morally justified in committing the murder of Sakina Khatoon who, he thought, had caused the death of his brother were mitigating factors." [19]The court reduced the sentence of one defendant from the death to life imprisonment, mitigated the crime of the other defendant from murder to intentionally causing grievous hurt, and reduced the second defendants's prison term from life to seven years.[20]

In *Tula Devi and Others v. State of Jharkhand*[21], the conviction of the defendants was upheld as per the offences under the IPC but the cognizance under the Prevention of Witch (Daain) Practice Act, 1999 was quashed. The reason given was that under the Act, the victim held the burden to prove that she has been tortured for being suspected as a witch, which she failed to prove in the case. Although it was established that the accused persons used called her a witch for two years on account of illness of son of one of the accused, after the recovery of the son from illness it can't be held that she was tortured on the account of being suspected to practice witchcraft. In *Madhu Munda & Ors. v State of Bihar*[22], the delay in lodging the FIR and the unableness to prove that some wrong was caused to the appellants or the family members due to the alleged witchcraft of the deceased, the order of conviction was set aside. Several PILs have been filed in the past against the state governments for inaction towards the rise in witch-hunts and inaction of the legislature which hinders the fundamental right to life of the victims. While condemning the practice of witch hunting, the Court issued certain directives for the State Government in order to eradicate the evil practice of witch hunting[23]. In *Smt. Moyna Murmu v. State of West Bengal*[24], the petitioners were driven out of

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19 Samtul Dhobi and Another v. State of Bihar, 1993 (2) BLJR 1041.

20 *Ibid*

21 Tula Devi and Ors. v. State of Jharkhand, 2006 (3) JCR 222 Jhr.

22 Madhu Munda and Ors. v. State of Bihar, 2003 (3) JCR 156 Jhr.

23 State Government Directed to follow certain measures in order to eradicate the evil practice of witch hunting, SccOnline.com, available at https://blog.scconline.com/post/2016/08/08/state-government-directed-to-follow-certain-measures-in-order-to-eradicate-the-evil-practice-of-witch-hunting/, last seen on 14/12/12017.

24 Smt. Moyna Murmu v. State of West Bengal, 2016 SCC On Line Cal 4272

their villages on suspicion of practicing witchcraft. The Court while observing the guidelines given by the Supreme Court in *Gaurav Jain v. State of Bihar*[25], directed State Government to undertake the following steps in order to ensure and eradicate the evil practice of witch hunting.

The State Government shall form a Committee comprising of experts from the field of public administration, sociologists, etc. to look into the prevalence of the practice of witch hunting in various districts in the State of West Bengal with special emphasis in tribal areas and the Committee shall submit its report to the State Government within six months from date of the order; The Committee shall specify in its report the areas in the State of West Bengal, if any, where there is substantial prevalence of the practice of witch hunting and based on such report the Government shall form special cells in the concerned districts to deal with the issue of witch hunting in the said districts. The Government shall also post intelligence and police officers in such special cells who would carry on surveillance activity, collection of information and/or intelligence in the matter and, if necessary, take preventive measures to ensure that such unlawful practices are not carried on.

In the event of the commission of a witch hunting related activity, officers of the special cells would promptly register criminal cases against the offenders and take necessary remedial measures in the matter. The victims of witch hunting shall be given District legal assistance through the Legal Services Authority as aggrieved persons who are entitled to legal aid under The Legal Services Authorities Act, 1987 and they shall also be extended necessary medical and psychological help and/or protection as they are the vulnerable witnesses of the crime by the State. The State Government may also explore the possibility of formulating a Comprehensive Victim Compensation Scheme under Section 357A of the Code of Criminal Procedure for victims of witch hunting.

Conclusion

Witch-hunting is still very much prevalent in India. There are instances where even educated people fall prey to this system and made part of it. It is because there are lack of national legislation, lack of evidence and issuing of report, ineffective implementation of established laws and rules. Hence the problem can be solved by strict enforcement as well as implementation of Anti-witchcraft law which will also prevent witch-hunting practices, also by

[25] S. 339-48, Indian Penal Code 1860.

sensitizing of police and welfare department and establishment of NGO's who will work for sensitization purpose. Because of lack of proof, the court is not being able to punish criminals Apart from it generally it is seen that the person who commits witch hunting are influential people and due to the fear and threat of those people no speaks against them. As witch hunting are more prevalent in backward areas to raise awareness witchcraft can be added as a subject in school as it is necessary to change the perspective of society and believe over superstition. But it is difficult to eliminate witch-hunting for he reasons discussed above.

THE SPECIAL COURTS UNDER LAW ON PROTECTION OF CHILDREN FROM SEXUAL OFFENCES IN INDIA: AN ANALYSIS

Dr. Shilpa M L*

Introduction

Child sexual abuse is one of the most pressing concerns of the day. The rising number of cases of children who are reported to have suffered some form of sexual abuse is indicative of the failure of the State and society to provide children with an environment conducive to growth, in accordance with the United Nations Convention on the Rights of the Child. However, it is also an opportunity to take cognizance of the problem and strive towards getting justice for victims, and aim to prevent future instances of child sexual abuse.

The child sexual abuse is an under-reported offence in India and is also a serious problem plaguing our society and has reached epidemic proportions. Children who are victims of sexual abuse are often known to the perpetrator in some way. Therefore, it is necessary to look into the problems of child sexual abuses which need to be addressed through less ambiguous and more stringent punishments and also it is essential to throw light on the working of the adjudicatory bodies which plays an important role for speedy disposal of cases related to violation of rights of children especially on child sexual offences and other related cases.

Children are every so often the only witnesses to sexual abusive crimes because by its nature, it being a private act, which is committed outside the site of others. Hence, corroborating physical or eyewitness evidence is not available to the Public Prosecutor to meet the standard of proof required beyond the reasonable doubt.[1] Child sexual abuse being an inexcusable crime needs proper outcome which depends upon the child's ability to substantially provide the information as evidence of assault. But this will be possible only when the environment of the Court permits so. It is an uphill battle faced by the sexually abused child as it is the child who witnesses to the crime committed against them. One of the main issues is regarding the disabled child where the child requires consideration and brings about additional complexities. Sometime, it may happen so, where the authorities may decline

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to question the children with disabilities by considering them as unreliable witnesses. Therefore, it is the Special Court under the POSCO Act which prescribes structural requirement which is limited. The Pre-requisite of the Act includes the designation of Special Courts, appointment of Special Public Prosecutors and use of accurate tools to avoid the face to face contact between the child victim and the accused during the time of evidence and also the Act is gender neutral as "Young boys are being increasingly subjected to forced sexual assaults".[2]

In this perspective the researcher makes an attempt to know the condition of Special Courts which are supposed to be child friendly and also discusses the reasons for failure on the part of the respective authorities constituted under the Act to fulfil the formalities of implementation. It also examines the structural and procedural compliance of Special Court with reference to POSCO Act and Rules by identifying the gaps and challenges in its functioning process by articulating the workable solutions which are to be adopted by Special Courts in conducting trials. Further, the article focuses on the functioning of Special Courts, which is admittedly a part of criminal justice system that victims will encounter throughout their experience with any case registered under the POCSO Act.

Tractable Ability of the Special Courts in Supervising the Child Sexual Abuse Cases

It is pertinent to know that, the Parliament has enacted the Protection of Children from Sexual Offence Act[3] and the Protection of Children from Sexual Offences Rules, 2012[4] which was formulated to effectively address the heinous crimes of child sexual abuse and sexual exploitation of children.

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2 In March 2000, the Law Commission of India published the 172nd Report on Review of Rape Laws after consultations with Sakshi, Interventions for Support, Healing and Awareness (IFSHA), All India Democratic Women's Association (AIDWA) and the National Commission for Women (NCW). The Law Commission recommended amendments to the Indian Penal Code (IPC), the Criminal Procedure Code (CrPC) and the Indian Evidence Act (IEA). It recommended substitution of the word "rape" with "sexual assault", making the offence "gender neutral", and widening its scope

3 Gazette of India, Extraordinary, Part II, Section 3, dated 9 November, 2012, published by the Ministry of Women and Child Development, Government of India.

4 Gazette of India, Extraordinary, Part II, Section 3, sub section (1), published by the Ministry of Women and Child Development, Government of India.

Nonetheless, even after 8 years of its inception, the Act has faced unforeseen challenges in its complete implementation due to the paucity of Special Courts. Further, it is appropriate for the Special Courts to bear in mind that the objectives of the POCSO Act is "to protect children" from sexual offences and it is a special law for children, enacted pursuant to the constitutional obligation.[5] Opting in favor of the upper limit of an ossification test which invariably deprives adolescent children from protection under law.

The POSCO Act empowers the State Government to designate a Sessions Court which is termed as Special Court, formed in consultation with the Chief Justice of High Court to try the offences under the Act in enabling speedy trials.[6] Whenever there is a legal framework created for the protection of Child Right Act, 2005 the same should be used even though there are availability of multiple courts which are of no usage.[7] Consequently, if any court is notified as Children's Court under the Commission for Protection of Child Rights Act, 2005 or if any other Court is notified as Children's Court for similar purpose then such will be designated as Special Court under the POCSO Act.[8] This is due to the recognition of child in distinct status, which requires special care and attention. The sexual offence being heinous in nature will affect the child mentally and physically by causing long term damage to the health and mental state of the child. Therefore, in such situation child requires support from family as well as from the Court of law in understanding the complexities of abuses.

The POSCO requires an understanding of complications of abuse, the child should feel strengthened, evidence should be sensitively pursued, and the privacy of the child should be secured. Furthermore, the matters pertaining to POSCO are dealt under Special Courts to ensure speedy trials but inevitably there are no particular and specific judges and Special Public Prosecutors who are meant only to take up the cases concerning the child sexual offences, which obviously results in delay in providing justice to the victimized child and the child loses its potential capacity by being exposed to accused person, police and the Advocates. In this perspective it is the need of the hour to know the working capacity of the said Special Courts in providing

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5 Art. 15(3) of the Constitution of India.

6 Section 28 of POCSO Act, 2012.

7 Parliamentary Standing Committee on Human Resource Development, Two Hundred Fortieth Report on the Protection of Children from Sexual Offences Bill, (Standing Committee Report on POCSO Bill)

8 *Ibid,* Section 28(1)

speedy Justice to the victims of child sexual offences in India because the very purpose of the framing of the Act seeks to put forth by making it easy to go on by including mechanism for a child-friendly reporting of evidence, investigation and speedy trial of the offences through designated Special Courts, so that the child can be free from mental and physical agony in its testimony.

The POSCO Act makes it necessary to appoint Special Public Prosecutor[9](SPP) for conducting the cases only under the Act, where it requires the Advocates with minimum of seven years of practice to be eligible to be appointed as Special Public Prosecutor. The reason for appointing the SPP is to be dedicative in handling the child sexual abuse cases as is it very much required to have well trained in the provisions and are well known with the procedural requirements and to handle the cases with patience creating child friendly environment. The POCSO Act also ensures that the family members of the child, a guardian, a friend or relative with whom the child has confidence should be allowed inside the Court room[10] in order to create a child friendly atmosphere which may enhance the confidence of the child. The Act also require the Special Court to ensure that the child is not exposed to the accused during the time of recording evidence. In order to overcome this difficulty, the Act ensures the recording to be done using video conferencing, single visibility mirrors, curtains and other devices.[11] The reason for providing such protection is to maintain the mental stability and the confidence of the child, which may otherwise destroy the self-confidence of the child.

Procedural Acquiescence by the Special Courts

The POCSO Act provides several procedural safeguards while handling the cases under the POCSO Act. The acquiescence with these procedures ensures that the due process is followed. The provisions of the POCSO Act are in accordance with the Guidelines on Justice in matter involving Child Victims and Witnesses of Crime, 2005[12] and the Model Guidelines under Section 39 of the Act.[13] The child-friendly procedures are followed by the

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9 *Ibid,* Section 32(1).

10 *Ibid,* Section 33(4)

11 *Ibid,* Section 36(1)

12 Guidelines on Justice in Matter Involving Child Victims and Witnesses of Crime, ECOSOC Resolution 2005/20, Article 31, http://www.un.org/en/ecosoc/docs/ 2005/resolution % 202005- 20 pdf (2005 Guidelines).

13 Ministry of Women and Children Development, Model Guidelines under Section 39 of the Protection of Children from Sexual Offences Act, 2012.

Special Courts to try offences under the Act.[14] The child friendly pre-trial procedure poses duties on the police and are to be implemented at the time of reporting of offences and recording of child's statement. These are given in detail under the provisions of the Act which ensures that the child is protected from intimidation, whether intentional or not. All the legal representatives, whether representing the accused or the child, must be aware of these provisions.

The child friendly procedure in trial provisions are mentioned in Chapter VI and VIII where Chapter VI of the POCSO Act, explains the provisions regarding the recording of statement of a child,[15] recording of statement of a child by Magistrate,[16] additional provisions regarding statement to be recorded[17] which also includes medical examination of a child.[18] Chapter VIII explains the provisions relating to procedure and powers of Special Courts and recording of evidence which includes procedure in case of commission of offence by child and determination of age by Special Court,[19] period for recording of evidence of a child and disposal of case,[20] child not to see accused at the time of testifying,[21] trials to be conducted in camera,[22] Assistance of an interpreter or expert while recording evidence of child.[23] For determining the susceptibilities of children, additional measures should also be made available and utilized even in normal circumstances.

Procedural Analysis by Police, Doctors, Magistrate and Advocates

The Police, Doctors, Magistrate and Advocate have the due role to be accompanied in inspecting the cases of child sexual abuses.

i. Role of Doctors

The role of doctors and support medical staff are very much required at the time of rendering emergency medical care as well as at the time of medical examination.[24] The Medical Examination of a child shall be

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14 *Supra* 3.
15 Section 24 of POCSO Act, 2012.
16 *Ibid* Section 25
17 *Ibid* Section 26
18 *Ibid* Section 27
19 *Ibid* Section 33
20 *Ibid* Section 34
21 *Ibid* Section 35
22 *Ibid* Section 37
23 *Ibid* Section 38
24 *Ibid* Section 27(1) R/W/S 164A of Code of Criminal Procedure, 1973.

conducted in accordance with the procedure established under the Code of Criminal Procedure, 1973. Notwithstanding that a First Information Report or complaint has not been registered for the offences under the procedural law. The victim being the girl child shall be examined by a woman doctor. The medical examination shall be conducted in the presence of the parent of the child or any other person in whom the child have trust and confidence. During the time of medical examination, if the parents of the victim child is not present then the woman nominated by the head of the medical institution will make her/his presence during medical examination.

The doctors are often point of reference in confirming that a child has indeed been the victim of sexual abuse. When a doctor suspects that a child has been sexually abused, he or she is required to report the same to the appropriate authorities *i.e.,* the police or the relevant person. Not only the doctor any person who has knowledge that an offence has been committed against the child can directly report it to the Police or Magistrate.[25] Failure of which would amount to imprisonment for a term which may extend to six months with or without fine.

The child when brought to a doctor for medical examination to confirm sexual abuse, the doctor must take the written consent of the child which includes the information, comprehension and voluntariness. The information pertaining to medical examination should be given to the family members of the child as to what is involved therein, so that a firm decision can be taken whether to participate. The doctors i.e., the health care professionals have legal obligation to report the case and to disclose information during the consultation to the respective authorities even in the absence of consent. The documents with respect to the members present during the conversation with the child, the documents concerning the conversation with the child should be placed before the respective authorities.

ii. The Role of Police

Investigation in a criminal case commences with the lodging of First Information to the police and registration of a case by the police.[26] Section 9 of the POCSO Act is a non-obstante clause where FIR can be lodged either to the Local Police or to the Special Juvenile Police Unit. It

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[25] *Ibid* Section 21(1)

[26] Section 154 & 156 of the Code of Criminal Procedure, 1973.

is mandatory for the police to provide immediate care and protection either by taking the child to a shelter home or to the nearest hospital, provided the child is in urgent need of the same.[27]

The POCSO Act troupes the police in the role of child protector during the investigation process. The police personnel on receiving a report of sexual abuse of a child are given the responsibility of making necessary arrangement for the care and protection of child such as obtaining emergency medical treatment for the child and placing the child in a shelter home, when the need arise. The police are also obligatory to bring the matter to the attention of the Child Welfare Committee within 24 hours of receiving the report. While reporting, it is expected to report about the need of care and protection to the child and steps taken in this regard. The child welfare committee will then proceed to make further necessary arrangements for the safety and security of the child.

iii. The Role of Magistrate

Administration of oath is sine qua non before the witness is asked to tender evidence. When the witness steps into the witness box to give the evidence, the first duty of the judge is to administer oath.[28] The question as to whether the omission of oath renders her/his evidence inadmissible? In case of *Rameshwar Kalyan Singh* v. *State of Rajasthan*[29], it was held that an omission to administer , an oath, even to an adult goes only to the credibility of the witness and not his competency. The question of competency is dealt with in Sec.118 of Evidence Act. The Oaths Act does not deal with competency and under Sec.13 of the Act, omission to take oath does not affect the admissibility of the evidence.

The judge is expected to properly prepare before commencing the recording of evidence in open court. Proper charges has to be framed before the Trial commences since charge is the foundation of a criminal trial. Before framing a charge, the learned judge is expected to look into as to whether the investigating agency has produced all the relevant documents that are referred to in the final report are placed before the Court.

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[27] Section 19(5) of the POCSO Act, 2012.
[28] Oaths Act, 1969.
[29] AIR 1952 SC 54

The Magistrates dealing with the child abuses cases are expected to be sensitize about the various complexities involved in the cases of this nature, tendering evidences by the parties to the allegations is the process by which truth will be known. Therefore, recording of evidence, oral as well as documentary, is the most vital function of the trial judge and would occupy major portion of the time of the court every day. The judges are expected to know about the law dealing with the case of rape or sexual abuse of child but also with various provisions of the Criminal Procedure Code with regard to the manner in which the trial is to be conducted and the relevant provisions of the Evidence Act.

The judges should make a brief record of the preliminary step taken and his opinion as to why oath is taken. The judge should thereafter proceed to record the evidence of the child. The manner in which the child witness gives evidence should be carefully observed by the judge to find our whether it is tutored and make a record of the same. The likelihood of the child witness being tutored is a factor that the judge has to take into consideration in appreciating evidence.

iv. The Role of Advocates

The Advocates of Legal Aid Service or the Private Advocates can be appointed by the child or his /her family members. But, it is always the Special Public Prosecutor appointed under the Act, who will be in-charge of the trial in the Special Courts. The Advocates of the Legal Aid Service or the Private Advocate is required to build a good affinity with the Special Public Prosecutor, which ensures that the concerns in respect of child will be raised before the Court during trials in a justifiable way. It is the duty of the Advocate to provide independent representation and advice to the child. He is duty bound to express the views of the child, and at the same time he need not put forth before the Court any views which are shared to him as a matter of confidence. In case of divergence between the views of the child and the relevancy of information, the Advocate should look into the welfare and best interest of the child. In situation, where the Advocate alone is unable to resolve the conflicts as a matter of professional judgment, he may request the Court to appoint another Advocate.

Thus the active participation of doctors, Magistrates, Police and the Advocates are very crucial in providing justice to the victims in criminal justice system. But, regrettably the system is not working as per the provisions

laid down in the Act and unfortunately justice in the hands of needy are not effective in its implementation.

Judicial Investigation and Observation by the Special Courts

The Special Court has the power to try the offences[30] under Information Technology Act.[31] This is the special feature under the POCSO Act so as to take up the matters relating to the publication or transmission or sexually explicit material depicting children in any act or conduct or manner or facilitating abuse of children online. The Special Courts will take the cognizance of the offence as there is no procedure for committal to it for trial under section 209 of the Code of Criminal Procedure, 1973. The Special Court collects the evidence in the manner prescribed in Sec.33 of the POCSO Act. It is the duty of the Court to permit frequent breaks to the child during the trial by creating child friendly environment. The Court avoids the aggressive questioning or character assassination of the child by the counsel of the accused. It is the duty of the Special Court to protect the child from not disclosing the identity of the child unless the Special Court permits such disclosure of identity only on reasons being recorded.

The questioning on the age of the accused being an issue, the Special Court will determine the age of the accused by recording reasons in writing and such finding will not become invalid by any subsequent proof that the age of a person as determined by the Special Court was not the correct age of the person.[32] The Special Court record the entire evidence within a period of 30 days from the date of taking cognizance of the offence and the entire trial to be concluded within one year from the date of cognizance of the offence which is mandatory.[33]

The entire trial under the Act will have to be held in-camera. The Special Court has the power to record the evidence of the child in any place out of the court premises after forming a prior opinion.[34] The court has also the power to take assistance of translator or interpreter having experience and qualification provided if the child has any mental or physical disability. Overall, it becomes the duty of the special Court to provide protection to the child in every stage of the court proceedings in order to uphold justice.

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30 Section 28 of the POCSO Act, 2012
31 Section 67-B of the Information Technology Act,
32 Section 34(2) of the POCSO Act, 2012
33 *Ibid* Sec.35 (1) & (2).
34 Section 284 of the Code of Criminal Procedure, 1973.

In case of *Ram Chander* v. *The State of Haryana*,[35] the Supreme Court held that "the Court to be an effective instrument in bestowing justice, the judges must participate in the trial process by giving special preference and take special interest in delivering judgments". It is the broadened obligation of the presiding judge to conduct the proceedings which serve the objectives such as to search for truth and to render a meaning decision diligently. In situations where the advocates put up complex questions to confuse the witness and to get the decision in their favour, the judges should be firm enough to record the actual evidences given by the witness in the administration of justice. The recording of witnesses[36] is of more importance as the victim will be in a traumatic state of mind due the heinous offence committed against them. By the leeway of the reality of the prosecutrix and the genuineness of the version through cross-examination, the court must ensure that the cross-examination is the means of healthy approach to deliver justice and not the means of harassment which causes humiliation to the dreadful victims of crime.[37]

The Session Court dealing with the case of rape[38] must complete the proceedings within the stipulated period of two months from the date of commencement of examination of the witness.[39] Unfortunately, the protections are just in letters but not in spirit. Without proper investigation and evidence the victims suffers from mental trauma rather than justice in her hands. So for, it is true that female being a subject of careful protection has become the object in the hands of culprits. Plethora of laws, Special Courts, highly educated and well versed judges and advocates should be active in their participation in upholding justice rather than being a spectator of the situation.

Reasons for the Supportive Gap in Upholding Justice

There are many gap arising in giving effect to the provisions of the Act, which would have been removed by the Central Government within two years of the Act coming into force.[40]Conversely, the first two years moved by laying down the guidelines for implementing the Act and designating the Special Court mandate under the POCSO Act. As a matter of fact, those

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35 AIR 1981 SC 1036

36 Section 280 of the Code of Criminal Procedure, 1973.

37 *The State of Punjab* v. *Gurmit Singh & Ors*, AIR 1996, SCC (2) 384

38 Section 376 (A) & (B) of Indian Penal Code, 1860.

39 *Ak@ Javed* v. *State NCT Delhi*, (Crl.A.1735)l

40 Sec.46 of the POCSO Act, 2012.

engaging with the law had already in progress documenting their experiences in the form of minor-research and reports and were also using their practical experiences to sensitize police, public prosecutors and judges. Some of the important factors contributing in creating gap are the delay in completion of trial which are seen in cases where it has been ascribed to the investigating agency, judicial machinery and the parties before the Court[41]

The main gap in providing justice is by the investigating agency, which the defense attempts to place on record as an 'incurable irregularity'. The investigation skill of the police officers relentlessly falls short of required standards. The Supreme Court in case of *State of Gujurat* v. *Kishanbhai*,[42] enumerated the lapse of investigating agencies. It was held by the Supreme Court that, it is very much required to adjudicate on the basis of well drawn parameters.[43] Despite, all such efforts it is heart breaking and sorrowful to tell that the cause of justice could be served neither to the child nor to her immediate family. It was further held by the Supreme Court that, on completion of the investigation in criminal case by the investigating agency, the prosecuting agency should apply its mind and require all shortcomings to be rectified and also can proceed towards further investigation if necessary. It was also held by the Supreme Court that the evidences gathered during the time of investigation must be truly and faithfully utilized, by taking into consideration all the relevant witnesses and materials proving the charges which are to be carefully presented during the trial. Concluding the same the Supreme Court held that at times of upholding the acquittal the court must direct "the Home Department of every State, to examine all orders of acquittal and to record reasons for the failure of each prosecution case. The responsibility of the same is vested with the Standing Committee of senior officers of the police and prosecution department." And those found responsible for such lapses would suffer departmental action. The POCSO

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[41] Complete charge sheet not supplied; documents not submitted by IO; FSL (Forensic Science Laboratory) report submitted improperly/ not submitted; prosecution witnesses not present; witnesses not summoned/ served due to change of address; victim not present; IO absent; verification of documents of accused/ victim not done (usually documents for age verification); adjournment sought by PP; documents of prosecution not available in the judicial file; statement of accused not ready; order / judgment not ready; judge on leave/ had to attend workshop/ busy elsewhere; court cause list heavy/ court's time out; accused absent; accused not produced from judicial custody; counsel of accused sought adjournment; quashing petition filed before the High Court; lawyers on strike.

[42] AIR (2014) 5 SCC 108.

[43] *Delhi Domestic Working Women's Forum* v. *Union of India,* (1995) 1 SCC 14.

Act being a Special Penal Legislation which is in accordance with Article 15(3) of the Constitution of India, is a special provisions for children.

Conviction under POCSO Act

The conviction of an accused mainly depends on the deposition of child before the Special Court. In this perspective the Special Court should guarantee a child with protective support to curtail challenges in the Criminal Justice System. The child should get an opportunity to have supportive hands i.e., the support person who enables the child to withstand pressure. A support person should be appointed in certain cases where the accused is a family member, relative or a known person to the victim's family. At times, the child turns hostile because of many reasons, in such circumstances the Court should appoint the 'support person', who could help the child in handling the mental trauma and pressure what the child faces which eventually helps the child in not turning reversal.

A sessions Court is designated as a Special Court and it has the power to pass sentence.[44] The Act is silent on the whether the imprisonment is simple or rigorous in nature. This is left to the discretion of the Court. The Sexual Offences are punishable with a minimum term of imprisonment, fine, except for storage of pornographic material involving a child[45] which is punishable with a term of imprisonment or fine or with both for penetrative sexual assault, the Special Court imposes a sentence of imprisonment which shall be for seven years and may extend to imprisonment of life. For the offences such as sexual harassment the imprisonment may be for a term which may extend to three years. Therefore, the Special Court imposes a sentence within the array stipulated under the law, and does not have power to reduce the sentence to less than minimum prescribed. The structure of our criminal law which is principally contained in the Indian Penal Code and the Criminal Procedure Code underlines the policy that the legislature has to define an offence with sufficient clarity and prescribe the maximum punishment.[46] In *State* v. *Mohd. Zahid* [47], the convict had been held guilty for commission of the offence of sexual assault[48] and indisputably the minimum sentence is for three years which may extend up to five years imprisonment.[49] "Whoever

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44 Sec.28 of POCSO Act, 2012.
45 *Ibid,* Sec.15.
46 *Jagmohan Singh* v. *State of U.P.,* AIR 1973 SC 947.
47 SC No. 103/13 ID No.02401R012013
48 *Ibid,* Sec.7
49 *Ibid,* Sec.8

touches the private part of the child which sexual intent which involves physical contact without penetration is said to commit sexual assault."[50] Court has no other option except to award the minimum sentence. The bare perusal of the Act reveals that the court have no option except to award minimum sentence of three years and more over there is nothing in the provision which mentions that court should award more than three years of punishment for touching more sensitive parts of the body. Because there arises aggravating and mitigating factors to award more than the prescribed minimum sentence. The discretion should be given to the court while determining the quantum of sentence. The provisions of the Act are to be suitably amended by the legislature or clarified by the Higher Courts.

Conclusion

The conversation of sexuality related topics are not so discussed with the children as a matter of age and the society restricts the same. Parents also do not feel comfortable to talk about the abuses what the children may face. This is the reason why many a cases do not see the light of justice as they are not reported because of the societal taboos. Every child needs to be safe and it is the right of every child to get protection. The amendment to POCSO is a right step at policy level. The only need is the proper and effective implementation of the provisions and policies with a long term approach which may change the mindset of the people. The purpose of the Special Court is to assure child friendly atmosphere and treatment for the victim i.e., the child. The absence of infrastructure, human resource and finance are again in letter but not in spirit. Many a States lack proper infrastructure facilities in Special Courts which is again an impediment.

Many of the acquittal in child sexual abuse cases also attributes to the fact that the police are not familiar with the POCSO Act and the Police fail to book the accused under appropriate sections of POCSO Act. Therefore, training and workshops should be conducted to the investigating agencies to handle the cases of child sexual abuse and the module on the 'offences and the children' should be made mandatory for the investigating authorities to get familiar with the child related legislations including POCSO Act.

As it is well known that the Special Courts are designated for providing a "speedy trial"[51]. The period within which the trial may be concluded is one year. But, due to some of the genuine reasons, unavoidable circumstances and

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[50] *Ibid,* 44

[51] *Ibid,* Sec.28(1).

due to several other factors the delay is caused in providing justice, the case load in Special Courts increase every year. This in turn makes the child to mitigate with the same circumstances where the child has to face the accused and narrate the incidents which causes mental agony to the child victim which also paves way for the child turning hostile.

It is sarcasm that, though there have been series of child right laws in all sphere, there is a little concern shown for his/her right. The child may be small but the offence committed on the child is very grave. The quantum of punishment imposed to the accused in POCSO Act is very less compared to the offence committed against young children. Hence, there is a need to amend the provisions of punishments under the Act and the Special Courts should be embanked to pass more stringent punishments along with speedy disposal of the cases. This to some extent gives feather to the enactment which is featherless. The help of modernized technology *i.e.,* e-governance should be taken into consideration which makes the criminal justice system more transparent and justiciable. Overall, the financial assistance to the respective State Government to carry on the functions of the POCSO Act is the main objective which has to be severed in order to save the child from the web of injustice.

IMPACT OF SUPERSTITIONS AND BELIEF SYSTEM ON MARRIAGES IN INDIA WITH SPECIAL REFERENCE TO CONDITION OF HOROSCOPE MATCH: NEED OF SUITABLE LEGISLATION

-Dr. Rekha Pahuja*

Introduction

As we know that marriage is an important institution in the life of every human being. It is true that No Hindu scriptures have written that one should always marry by checking kundali only**.** Marriage never depends on Gunas and Kundalies, this is blind to believe. Marriage depends on two person's love. No hindu scriptures has written that one should always marry by checking kundali only. Even if it is written it is not a neutral note. One who is unknown to this kundali stuff , like some Christian person or some other religion person, if he marry without kundali, so is it 100% that he will end up in brake up?

No, never. We should consider or treat kundali probabilities as notices or precautions but it is foolishness to blindly believe in kundalis. People should believe that it is the understanding between the two individuals that matters, not the matching of their stars. It must be noted that matching horoscopes cannot guarantee a successful marriage. There have been a lot of cases where despite matching horoscopes, the couples do not lead a peaceful and happy married life. Most marriages in India are still arranged, where matching of horoscopes is the first step taken before a marriage. However, we still witness divorce cases amongst so called "ideal kundali couples." Rather, such cases are only on an increase these days.

This article basically analyses the blind belief system of many people of India in marriages, role of astrologers affecting peoples mind to take decisions as per their whims and need to have good deal of legislation for securing welfare of people.

Significance of Study

Marriage is considered as the most sacred relation between the husband and wife. But the most pertinent question which arises is how these marriages are fixed in the community like India. There are basically two types:[1]

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[1] https://www.culturalindia.net/weddings/arranged-marriage.html

Arranged marriages: These are long drawn out processes, where finalizing the perfect match may take months and even years. In typical arranged marriages, the parents decide every facet of the process and the prospective bride and groom just show up at the prearranged date of marriage. The parents send out words through that they are looking for a match for their child through their social circle (neighbors and relatives). They might also employ the services of the local matchmaker. Traditionally the matchmaker is an individual who keeps a database of marriageable individual from the neighboring area. Once a match is established, the elders of the family first meet at a neutral place to talk and also to figure out the suitability of the match firsthand. In these meetings, the families try to judge the financial and cultural barometer of each other through direct or indirect talks.

Love Marriages: It is considered as modern type of marriage in which the boy and girl choose each other for the purpose of marriage. In arranged marriages generally majority of the people from upper middle class or middle class only after getting the horoscope match takes the things further. It means if it is not matched then most competent and suitable alliances are ended there only. It really shakes our conscience and poses a question before us that whether it is necessary to get horoscope matched and if it is not done then the very sacred and precious institution of marriage will be failed. If the answer is negative then it is high time that such belief system shall be regulated by proper legal mechanism so that people in India will get right and better insight in most important social matters and be free from at least from this superstition. The problem selected by the researcher is found in many communities in India. Therefore it invites great attention of Law Makers, Judiciary to deal with the issue.

Objective of Study

The objectives of the study amongst all include the following:

1. To study the historical background horoscope match in marriages.
2. To analyze the role of astrologers and pundits on people's belief system.
3. To analyze the views of astrologers and common people on the efficacy of horoscope match on post marital life.
4. To analyze dearth of legislative safeguards to regulate this superstition
5. To conclude with Proper recommendations.

Methodology Used

The researcher has selected doctrinal as well as non-doctrinal method of research for the purpose of collection of data.

Meaning of Superstition

Superstition generally means something which we follow without any logic or science involved. The belief in supernatural causality-that one event

causes another without any natural process linking the two events-such as astrology, religion, omens, witchcraft, prophecies, etc., that contradicts natural science. It is a belief which is not based on scientific knowledge; it is driven by mysteries and magical stories. So, it is quite complex to understand superstition in the scientific context. Scientists have done various researches and studied about the psychology behind the belief but sometimes, it is unbelievable how few practices are drawn and continued till now as opposition to superstition was never questioned in the contexts where gods and deities existed. Superstitions are not only those which are passed to us from our ancestors but they evolve from us now as well. For example, if a person thinks that wearing a particular shirt in any examination would bring good luck to him and he will pass with flying colors; then this belief is called superstition.

The most sacred institution of marriage is also not left free from many superstitions. One of such beliefs is that if a person born under the influence of mars is called Manglik or Mangal Dosha.[2] People avoid marrying a Manglik and especially women face this problem a lot as people believe that if a person marries a manglik then they will end up having a divorce or marriage won't last for long time and they will face problems. But the strange thing is that if a manglik man marries a manglik woman then they assume that the bad effect is eliminated and they both can live together happily. Following are some of the beliefs observed by many people in India:

Popular Pre and post Marriage beliefs in India

In many parts of India, there are a number of popular beliefs and superstitions related to marriage, which has been passed on from one generation to another.[3]

1. **Spilling of milk**: It is believed that during the time of wedding, family members must be careful while boiling milk. It is said that spilling of milk before or after the big day signals some pending misfortune.
2. **Dark colour of mehandi brings luck to the bride:** The darker the bride's henna colour appears, stronger her marriage will be. Another superstition is that, if the *mehendi* lasts longer on the hands of the bride than her groom, she will get lots of love from her in-laws.

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2 https://timesofindia.indiatimes.com/astrology/relationships-marriage/the-effects-of-mangal-dosha-and-the-suitable-remedies/articleshow/68205268.cms

3 https://in.finance.yahoo.com/news/10-interesting-indian-wedding-beliefs-superstitions-055650419.html

3. **Fall of Kaleere:** In the north Indian customs, brides wear *chooda* on which her family members and friends tie *kaleere in* (red and golden ornaments). After this, the bride moves her hand over the head of the unmarried girls (or boys sometimes). It is said that if *kaleerein* falls on someone's head, then that get married.
4. **Good and bad Sights:** On your wedding day, if you see a black cat or a rainbow then it is considered to be a good luck. But, spotting an open grave, lizard or a pig is a bad fortune.
5. **Falling of rain:** If it rains on your wedding day, then don't be gloomy. Although, it may dampen some of your preparations but it is considered to be an auspicious omen. Falling of rain is a good sign for fertility of the married couple.
6. **Lilting Candles on the day of marriage- a bad omen:** It's not a good sign if the candles lit start to sputter out during your wedding. If it happens, it is believed that an evil spirit is nearby.
7. **Throwing rice:** Throwing rice at the couple during their wedding is considered to be auspicious. It is a sign of abundance and fertility as well as a way to protect the newlyweds from the evil spirits.
8. **Entering with the right foot:** It is usually considered to be unlucky if the bride enters her new home with her left foot first. So, the bride has to enter with her right foot first.
9. **Picking up of dishes:** In some cultures, the new bride is asked to pick about 7 silver dishes from the floor. It is said that more the sound from the dishes, the more couple will fight.
10. **Full Moon brings happiness:** If there is a full moon one or two days before your wedding day, then your married life will be filled with luck and happiness.

Horoscope Match

Horoscope matching is an indispensible part of the arranged marriage process and it is generally the cinching criterion for finalizing the talks. Horoscope refers to the birth chart or natal chart of an individual, based upon the positions of astrological luminaries like the Sun, the Moon, the Planets and other stars at the time of the individual's marriage. It generally holds important life predictions as well as describes the individual's character based on the positions of astrological bodies in specific positions. In India, it is believed that the horoscope holds the key to every important events of an individual's life and Vedic Astrology is followed as the preferred method. The horoscope matching according to Vedic Astrology is based on nakshatras or Lunar constellation and the process is known as Guna Milap or Ashtakoot

Milan. This assesses the compatibility of the two people in focus based on thirty six points or guna. To be deemed a good match at least eighteen out of thirty six gunas need to be matching. Other astrological conditions also needs to be determines such as Mangalik Dosha which occurs when the planet mars is positioned in 1st, 4th, 8th and 12th house of the birth chart. The priest, who is matching the kundalis or birth charts, then prescribes some remedies to counteract the negative effects.

Historical Background of horoscope match in marriages

Historically speaking, weddings during the Vedic times took place by a variety of methods. While arranged marriages were preferred, the consent of the bride was generally taken into consideration. In case of royal families, parents arranged a Swayamvar, a ceremony where suitable matches from all over the country were invited. Thereafter, either these suitors had to prove their prowess to win over the girl, or the girl herself will choose one of them, by offering him a flower garland. Even love marriages and elopements were quite common. The couple in love will elope and undergo what is known as 'Gandharva' type of marriage.[4] There was no practice like this before, Even Ram and Seetha got married without horoscope match. Similarly horoscope had not been matched in case of Lord Shiva, Brahma, Vishnu or any other God. It is a system which has become more common in recent time as the astrologers are making money from it Like many practice is and rituals which has developed through different phases of Hinduism, this is also one .Some astrologers are using their Vedic astrology knowledge for monitory gains. There is no Vedic religious test that states horoscope match is essential before marriage.

Role of Astrologers and Peoples psychology

It is believed that the Astrologers look into the *kundalis* from the viewpoint of the circulation of planets. They say that the individual personalities appear as per the circulation of planets. And as the couple would stay together, their stars and planets will exert influence on their partner's destiny as well. So, the astrologers check for the compatibility of the stars of both the partners. Besides, they also tell about their behavioural compatibility of with each other.

The main reason of matching astrological charts is to ensure that the couples will have a happy and comfortable life. The renowned astrologer, *Bejan Daruwalla*, says, "The importance of match-making is very essential in life if you want the marriage to be successful. This is because the nature of the

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[4] https://scholarblogs.emory.edu/postcolonialstudies/2014/06/20/arranged-marriages-matchmakers-and-dowries-in-india/

person can be predicted through his/her horoscope. You can know whether your partner will be sincere in marriage or not, how will be your relationship with each other, how will be your relationship with your mother-in-law. etc. Also, the very important thing is that you can know about the sexual life, like how much will you enjoy it. If you know all this in advance, it will really help you in having a blissful wedding life."

According to Astrologers there are eight points, known as *gunas*, which are added while matching these charts. Each *guna* has a specific value, and the sum of all these eight *gunas* come to a total of 36. It is believed that a minimum of 18 points should match among the couple to have a happy married life. If the matched points are more than 27, then it is considered the best probable match. If the points come out to be less than 18, then the marriage is not advised.

A pioneer in the field of astrology, Bhrighushree Monica Anand, suggests, "*Kundali milan* is the first step to the marital bliss. Out of the 36 *gunaas,* at least 50% should match among the couple to form a good alliance. Apart from these, the things, like *Manglik Vichaar* (evil effects of the planet Mars), *Kaal Sarp doshas* (when all seven planets are placed between *Rahu* and *Ketu*), etc., need to be carefully studied to ensure happy alliance and successful marriage with progeny."

An ardent Ganesha devotee, *Bejan Daruwallasays* that, "The most important thing is to be a good human being. I also feel that individual effort, sincerity, adjustment, tolerance and leaving ego aside will help you in making a marriage successful. We astrologers can only advise you. If you want to rely or follow it, it is all up to you. The process of comparing the astrological charts is followed to know well in advance, the solution for the difficulties in you as a couple would face." Marriage is never ending and every couple would want to have a successful and happy journey together. And, astrology is really very effective in making that happen.

Another famous astrologer, who is also a *Vaastu Shastra* expert, Jai Madaan, says, "I like to make charts based on the mental compatibility. Rest all are fear-creating factor. Astrological charts are given huge importance in Hindu Religion. Sikhs, Christian and many other religious communities do not go for it. And, they still lead a happy life. I feel if one believes in it, then only they must go for it."

Efficacy of Horoscope match and post marital life

1. Gunjan Goyal, Practicing Astrology since 15 years wrote that-There are many instances, where you say, 36 gun are matched and still people file

divorce. But, I should say, there many factors, which should be also matched like Whole, JanmKundli, Vismottari mahadasha, position of Mars, Saturn and Jupiter etc. Still, after matching all these details, astrologer may fail, provided person should also have correct birth details, then only correct horoscope can be created. One more thing, Astrologers are not god, we are also human. Even I also failed in 2 cases, but after doing around 800-1000 successful matches. So there are chances, that we can be wrong. Even, doctors, famous doctors, get wrong sometimes due to which patient may get die. Try to consult 2-3 opinion then only you should decide, what should be done.

2. Rohit Anand, Vedic Astrology Expert 25 Year's Experience in Occult Metaphysics Oracles Tarot says that First you need to understand the kundli matching. If its done just on the basis of traditional guna matching then it's become irrelevant and will lead to divorces. Secondly most people don't get their horoscope matched on more important issues of Life span, health, divorces, adultery, infertility, mental compatibility, sexual orientation, mental afflictions , career, money etc. Third divorce happens when any one partner fails to grow or improve as a person, so one needs another one to help grow, learn on life path and previous one becomes irrelevant or its value is not recognized by another one. Relationships are only meant to help us learn, grow, experience, love, and evolve. Sometimes in life one man or women is not enough to make us learn all the lessons of life, similarly people in marriage are there for sake of marriage but may not be in love, they may have sex to procreate sill not in love and living pathetic life without divorce. There can never be perfect kundli matching only negativity can be reduced to avoid sorrow but not fully as lessons won't be learnt by soul. Perfect match will make relationship dead nothing to learn and grow.
3. Rajeev Mahajan, a commoner on Quora is of the view that,[5] Astrology is a hard science. People hold beliefs that a person is influenced by the positions and movements of planets to match horoscopes. If this is the case then why two twins born at same time have so different destinies?
4. Sunny Nathani a commoner on Quora opines that- Astrology is a lost subject. Until it regains its all accuracy it should not be used for solving people's problem. [6]

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[5] https://www.quora.com/What-is-the-history-behind-the-origin-of-horoscope-3matching-in-Indian-Hindu-marriages

[6] https://www.quora.com/Why-do-some-arranged-marriages-end-in-divorce-even-after-perfect-kundali-matching

Astrology and the Law

Law is an instrument of social change. Therefore, in order to protect the society from objectionable advertisements through drugs and magical remedies, "The Drugs and Magic Remedies (Objectionable Advertisements) Act, 1954" was enacted by the Parliament. However the inhuman and evil practices of Aghoris etc., were left beyond the scope of this Act. That is why to deal with this issue specifically a new law was made by Maharashtra State Government which is known as "The Maharashtra Prevention and Eradication of Human Sacrifice and other Inhuman, Evil and Aghori Practices and Black Magic Act, 2013". The questions now arise are:

1. Whether astrology of horoscope in match making is superstition?
2. Whether above mentioned laws regulate theses issues?

Regarding first question, Hon'ble S.C. of India in 2004 made following observation-

"*Astrology requires study of celestial bodies, of their positions, magnitudes, motions and distances etc. Astronomy is a pure science. It was studied as a subject in ancient India and India has produced great astronomers long before anyone in the Western world studied it as a subject. Since astrology is partly based upon movement of the Sun, Earth, planets and other celestial bodies, it is a study of science at least to some extent*"[7]

So, the verdict of Supreme Court was very clear and it ended the tragedy of a true astrologer, who was always scared as he could be booked under Drugs and Magic Remedies Act and for spreading superstitions by astrology baiters and haters. Therefore, it can be said that the astrology of horoscope match is not superstition.

Again, it is worth mention that either the Drugs and Magic Remedies Act, 1954 or The Maharashtra Prevention and Eradication of Human Sacrifice and other Inhuman, Evil and Aghori Practices and Black Magic Act, 2013 do not cover astrology and related disciplines. Thus, Astrology is left beyond the ambit of law. In the year 2013, Scientist Jayant Narlikar, while speaking at the two-day workshop on comet ISON at the College of Engineering, Pune said that the study he conducted with Dabholkar goes to explain why astrology is not a science through a simple experiment.[8] They adopted an experiment conducted by Bernie Silverman, a graduate student of Michigan State University, USA. They collected horoscopes of 100 scholarly students and

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7 AIR 2004 SUPREME COURT 3478: 2004 AIR SCW 3194

8 https://timesofindia.indiatimes.com/home/science/Astrology-came-with-Alexander-says-Jayant-Narlikar/articleshow/23437460.cms

100 students with learning difficulties. After a random selection from these horoscopes, two sets of 40 horoscopes each were prepared. They then invited astrologers in the country to separate horoscopes of scholarly and disabled students and laid down some statistical guidelines for them. It was decided that of the 40 horoscopes, the astrologer needs to get at least 28 accurate results as a testimony of their successful predictions.

Around 53 astrologers asked for samples of the horoscopes and 27 replied with results. The best performer among the respondents had 24 correct results. Hence, none of the astrologers could pass the test. The average of all the respondents came to 17, way below the 28-mark. Narlikar said, "Our test asked a focused question and the astrologers could not point toward any ambiguity in interpretation. We told the astrologers that the real predictive success could be claimed only at the 70% level for their sample size. The test demonstrated the hollowness of the basic claim of astrology." The study was published in the 'Current Science' journal in March 2009.

Conclusion and Suggestions

Thus, it can be said that what is important in marriages is the need to understand each other rather than stars. A good man with a bad kundali can prove to be an ideal life partner, rather than a bad man with a good kundali. Moreover, not everyone understands the science behind horoscope matching. A common man does not possess the knowledge of star reading. Hence, for matching of horoscopes, we ultimately approach a third party, like a *pandit* or online software. Hence, we can’t be sure whether the prediction made is true or false.

Therefore, it is suggested that the parliament should make a separate law to regulate astrology so that people in India will be having a better picture as to astrology and the very sacred institution of marriage would be protected from blind beliefs.

MARINE POLLUTION IN COASTAL INDIA: ISSUES AND CHALLENGES

Ms. Nalina. N*

Introduction

Oceans have historically played a significant role in shaping global history.[1] About seventy percent of the earth's surface is covered by water. As a medium of navigation and travel, the sea has long facilitated world exploration and trade. As a source of immense resources, it has been the lifeblood of human communities from time immemorial.[2] Marine pollution is a global problem in several senses. It affects the health of the oceans in all parts of the world, it affects all countries, both developed and developing, and all countries contribute to some aspects of the problem. Some marine pollution problems are local, but many have international implications. Mainly if the effects of pollution on the sea's living resources are considered, very few marine pollution problems can be regarded as matters of exclusively local interest.[3]

India has a coastline of about 7500 km, with about 25% of its population living in the coastal areas. Many major cities are located along the coast, including Calcutta, Madras, and Bombay.[4] In India, there are 11 major, 16 intermediate, and 78 minor ports.[5] The past few decades have witnessed demographic pressure and rapid industrialization in the coastal areas of our country.[6] This apparent reason for the availability of infrastructures like ports

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1 Naidu, G. V. C. INDIA AND THE INDIAN OCEAN. Edited by Ajaya Kumar Das, S. Rajaratnam School of International Studies, 2013, pp. 236–259, INDIA-ASEAN DEFENCE RELATIONS, www.jstor.org/stable/resrep05896.13. Accessed 19 Oct. 2020.

2 Sam Blay, Ryszard Piotrowici, et.al.(eds.), *Public International Law an Australian Perspective*, 324, Oxford University press, New York, second edition 2005.

3 Oscar Schachter and Daniel Serwer, "*Marine Pollution Problems And Remedies," 65 Am. J. Int'l L. 84 1971, https://heinonline.org/HOL/Landing Page?handle=hein.journals/ajil65&div=9&id=&page.*

4 Glasby, G. P., and G. S. Roonwal. "Marine Pollution in India: An Emerging Problem." Current Science 68, no. 5 (1995): 495-97. Accessed November 4, 2020. http://www.jstor.org/stable/24096463.

5 *Ibid.*

6 Subramanian, B. R. "Long-term Data on Coastal Pollution and Dissemination to Academic and Research Communities." Current Science 100, no. 1 (2011): 49-51. Accessed November 5, 2020. http://www.jstor.org/stable/24069712.

for import of raw materials and export of finished products, the immense avenue to use the sea as a place for waste disposal by municipalities and industries, and more so, use of sea-water for industrial cooling.[7] The other reason is the population growth in the coastal region and demand for higher living standards, and an increase in the scale and source of marine pollution.[8]

Meaning of Marine Pollution

There is no universal definition for the term marine. But the 21st Century Chamber Dictionary says that "it is something related to sea" and marine includes oceans, bay, and its marginal seas, which contain saltwater. Various Pollution laws define marine as it is the area of saltwater, which occurs on the surface of the earth". But these definitions are not exhaustive by it, and they failed to cover certain essential aspects like nature, composition, and its unique features, *etc.* As commonly understood, the term "marine pollution" refers to an action or a situation that changes the quality of sea-water for the worse.

Oxford English Dictionary defines pollution as "the action of polluting or condition of being polluted, uncleanliness impurity.[9] Marine pollution as defined by the Group of Experts on the Scientific Aspects of Marine Pollution (GESAMP), as part of the basic framework of the UN Convention on the Law of the Sea (UNCLOS) 1982 (Article 1.4) is:

> "the introduction by man, directly or indirectly, of substances or energy into the marine environment (including estuaries) resulting in such deleterious effects as harm to living resources, hazards to human health, a hindrance to marine activities including fishing, impairment of quality for the use of sea-water, and reduction of amenities."

Sources of Marine Pollution

The word "source" originally refers to the point of a place where a stream or a river begins.[10] As often used in a broader sense, the origin from which anything comes or is obtained. As far as pollution is concerned,

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7 *Ibid*

8 Hardy, Michael. "INTERNATIONAL CONTROL OF MARINE POLLUTION." Natural Resources Journal 11, no. 2 (1971): 296-348. Accessed November 5, 2020. http://www.jstor.org/stable/24880031.

9 C.T. Onions ed., the shorter Oxford English Dictionary, Oxford Clarendon Press 1970 pg. 1538

10 Gove P. Wedster, "Third International Dictionary", Springfield, Mass G & C Merriam Company, 1993

"source" sometimes refers to the place from which harmful substances cause pollution is generated and sometimes refers to the human activities from which toxic substances are introduced to the environment.[11] The significance of identifying source for pollution control is observed – there would be no pollution introduction of a harmful substance into the marine environment was controlled at the source. Therefore, taking measures at the source is always in strategy, the first alternative in strategy planning.

Although pollution control at the source sounds like a very logical solution, it is not easy to do. The governance of human activities on land that impacts the marine environment is incredibly difficult to grasp. Regulation is primarily left in the hands of coastal states with differing laws and policies.[12]

Types of sources:

1. Point source.
2. Non-point source.

1. **Point source of marine pollution :**The point source of pollution is those for which a particular point of entry of pollution into the environment can be identified. They can be associated with localized gradients in the concentration of pollutants and can often be traced and found in this way. Point sources are usually found for industrial plants, sewage outfalls, reclamations, and other earthworks. Still, they can occur in different pollution categories not typically thought of as point sources, such as groundwater in a lagoon. The point source of pollution may only account for a fraction of the land-based source affecting marine environments.

Municipal sewage

The volume of sewage discharged into the oceans is increasing with population growth. Municipal wastewater from homes and the public building consists primarily of human wastewater, which contains organic matter, nutrients, suspended solids and sediments, pathogens, and greywater," which is water from sinks, showers, washing machines, and other similar sources, with billions of people on the planets, disposal of sewage waste is a major problem.

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[11] Nan Quing Meng, "Land Based Marine Pollution: International Law and Development", Graham and Trotman, London 1987, Pg. no 18.

[12] David L. Vander Zwaag, Ann Powers, The Protection of the Marine Environment from Land-Based pollution and Activities: Gauging the Tides of Global and regional Governance, The International Journal of Marine and Coastal Law Martinus Nijhoff Publishers, 23 (2008) pg. 423-452,

According to the World Health Organization, some 780 million people (11 percent of the world population don't have access to safe drinking water, while 2.5 billion (40 percent of the world's population) don't have proper sanitation, although there have been significant improvements in securing access to clean water, relatively little progress has been made on improving global sanitation in the last decade. Sewage disposal affects people's immediate environments and leads to water-related illnesses such as diarrhea that kills 760.000 children under five each year. In developed countries, most have flush toilets that take sewage waste quickly and hygienically away from their homes. Yet the problem of sewage disposal does not end there. When you flush the toilet, the waste has to go somewhere and, even after it leaves the sewage treatment works, there is still waste to dispose of sewage waste is pumped untreated into the sea. Unfortunately, even in some of the richest nations, the practice of dumping sewage into the sea continues.

Industrial Activities

For centuries, surface water has been used as a dumping ground for every conceivable kind of human and industrial wastes, some of the highly toxic. Industrial activities in coastal areas have been identified as another significant source of land-based marine pollution. The world's ocean is being polluted by a wide variety of industrial effluents, which, according to their physical and chemical characteristics, may be classified as dissolved organic substances, including nutrients insoluble organic substances, inorganic substances, and radioactive materials. A vast range of wastes, such as biodegradable organic wastes, persistent organic waste, and insoluble inorganic wastes, are derived from industrial activities and damage the marine environment. However, the nature of industrial activities and is damaging the marine environment. Although industrial pollutants are sometimes different from region to region, affecting the environment in different ways, major industrial sources are chemical manufacturing (organic and inorganic), petroleum refineries and oil terminals, iron and steel industries, and food processing and manufacture. These wastes can be discharged indirectly, via sewage treatment plants, or directly through pipelines with outfalls along the coast or into rivers and estuaries.

2. Non-point Source

According to the National Ocean and Atmospheric Administration (NOAA), 80% of the marine environment's pollution comes from the land. One of the most significant sources is called non-point source pollution, which results in the run-off. Non-point source or diffuse sources are harder to

identify and result from broad-scale activities that cannot be readily identified as originating from a single source. Correcting the harmful effect of non-point source pollution is costly. Each year, millions of dollars are spent to restore and protect areas damaged or endangered by non-point source pollutants. These are harvested from large areas within which polluting activities are occurring and are usually mobilized by water or air. They typically are carried by urban storms, water run-off overflow discharges, and run-off from forest and agriculture/aquaculture.

Agricultural and urban run-off is considered to be a significant source of non-point pollution. Agriculture practices are not free from the onset of pollution. Waste refuse of any kind from agriculture practices is liable to cause pollution. Persistent organic pollutants (POPs) are a set of toxic chemicals that are persistent in the environment and last for several years before breaking down. POPs circulate globally, and chemicals released in one part of the world can be deposited at far distances from their original source through a repeated process of evaporation and deposition. This makes it very hard to trace the original source of the chemical.

In 1995, the United Nations Environment Programme expanded its research and investigation on POPs with an initial focus on what became the "Dirty Dozen." These were a group of 12 highly persistent toxic chemicals: Aldrin, chlordane, DDT, diel Drin, endrin, heptachlor, hexachlorobenzen, mirex, polychlorinated biphenyls, polychlorinated dibenzo-dioxins, polychlorinated dibenzofurans, and toxaphen. Many of these pesticides in this group are no longer used for agriculture purposes, but a few continue to be used in developing countries.

Urban waste includes waste from construction sites, pet wastes, domestic sewage, which is maximumly dumped into the ocean through run-off. Domestic waste needs a high level of oxygen for its decomposition; it is oxygen demanding pollutants.

These two forms of pollution are discharged directly into the sea or enter through rivers, floods, tides, or atmospheric deposition, which means that the pollution source located far away from coastal areas still impacts. What is a point source and diffuse source is also partly a matter of scale.

Major Types of Contamination

Sedimentation

Sediments are soil and minerals practices, which are carried away from the land in various ways. It's solid particles collected from croplands, unprotected forest and soils, overgrazed pastures, strip mines, disposal of domestic and industrial effluents. Even with the solid waste, wind erosion of coastal dunes, drying inter-tidal shoals, roads, etc. land run-off contributes to sedimentation's primary source. This further leads to sedimentation and the reduction of sunlight penetration, which inhibits photosynthesis and thus the generative capacity of marine living organisms.

Sedimentation causes disturbance in some marine living organisms, by causing respiratory disturbance in some living organisms including cockles, shrimps, crabs etc., if the loads of sedimentation increase above the average and another is that living organisms may be buried on the ocean floor. Sedimentation beyond naturally occurring processes is mainly caused by bad farming practices, deforestation, and poorly managed coastal development.[13]

Oil

Oil spills on ocean waters kill birds,[14] foul beaches, and poisons marine life. Ironically, the oil that drives millions of vehicles worldwide sometimes causes countless marine animals to the cruelest death. When refined, crude oil drives automobiles and airplanes, runs factories and farm equipment's, provides gas for heating and cooking, and is a source for making drugs, cosmetics, and fertilizers. But when crude oil spills on to ocean waters, it spells death for marine animals and disaster for the ocean ecology.[15] Another entirely different oil source in the marine environment results from accidents

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[13] Hassan Daud, "Protecting the marine Environment from Land Based Source of pollution towards Effective International Cooperation, published by Ashgate Publishing Limited (2009) Pg. no.11

[14] The world first woke up to the disastrous consequences of an oil spill when on 18th march 1967 a librarian tanker. Terry canyon, ran aground on the southwest cast of Great Britain, near the entrance to the English Channel, spilling 60,000 tons' crude oil into the sea. Oil splattered on to 160 kilometers of coastline killing countless number of fish and birds. Two years later, in January 1969 occurred the second major oil spill off the coast of Santa Barbara in the united states when an offshore oil well below out resulting in the discharge of oil at the rate of 1,000 gallons per hour causing extensive damage to the coast. In 1978, Amoco Cadiz disaster 68 million gallons of oil was dumped all along the French coast etc.,

[15] R. K. Sinha, marine and water environment pollution-control-laws, Indian publisher's distributors, 1999 ed., pg..no 72-73

that occur during the shipping and transfer process. When oil spills on the ocean waters, it spreads rapidly over the surface. Modern supertankers have been enormous vessels and therefore have major structural weaknesses so that occasionally they will break up in unusually heavy seas.[16]

Discharge of wastewaters

Coastal outfalls discharge directly to estuaries, in-shore waters, bays, and open coastal areas. Rivers act as large-scale collectors and carriers of wastewaters from diverse sources within their drainage basins and offload them to the sea. Rivers, is significant point sources of mixed contaminants, the inputs of which depends on the contaminant load of the rivers and on the physic-chemical and biological transformations taking place into the river itself, and especially in the estuaries and the nearshore zone.[17]

Impact of Marine Pollution on Coastal Environment

Currently, marine pollution is an increasing threat to a healthy marine environment. Indeed, marine pollution may severely damage the environment, including the eco-system and human health. It would be no exaggeration to say that coastal populations' welfare relies essentially on a sound marine environment. Thus, there appears to be a general sense that the protection of the marine environment is considered a common interest of the international community. Despite its vital importance, the regulation of marine pollution has attracted little attention until recently because of low awareness of environmental protection. Since World War II, that international regulation of marine pollution has begun to develop.

Habitat Destruction

Coral reefs are dying around the world as people and cities put more stress on the environment. In economic terms, reefs generate billions of dollars a year worldwide in tourism and fishing.[18] Coral reefs supply much of the sand for the region's beautiful beaches and draw divers and snorkelers to explore the diversity of marine life that they support. In addition to coral

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16 *Ibid*

17 Lakshman D. Guruswamy, Sir Geoffrey W.R. Palmer, "International Environment law and World Order A problem-Oriented Coursebook", American Casebook Series, West Publishing Co., 1994.

18 Sweeney, V., & Corbin, C. (2011). Implications of Land-based Activities in Small Islands for Marine EBM. In Fanning L., Mahon R., & McConney P. (Eds.), Towards Marine Ecosystem-Based Management in the Wider Caribbean (pp. 57-68). Amsterdam: Amsterdam University Press. doi:10.2307/j.ctt46n21t.8.

reefs, mangroves are also at risk due to human activities, particularly physical destruction for coastal development and charcoal production. As reefs and mangroves degrade and disappear, the protective services are diminished, resulting in coastline erosion and economic losses to coastal communities.[19]

Climate Change

The impact of climatic change on the ocean is becoming a matter of more pressing concern. Such influences include sea-level rise, coastal erosion, ocean acidification, altered food web dynamics, shifting species distributions, and reduced abundance of habitat-forming species, including corals.[20] The emission of greenhouse gas from shipping is known to contribute to global warming. In 2007, greenhouse gas emissions from shipping were estimated at around 2.7 percent of global carbon dioxide emissions, and such emissions are supposed to increase in the future.[21] The UNFCCC and Kyoto Protocol provide an international legal framework for combating climate change. However, the definition of climate change does not embrace the chemical change of the oceans. The Kyoto Protocol provides no specific requirement to reduce carbon dioxide emission and ensure that their aggregate anthropogenic carbon dioxide equivalent emission of the greenhouse gases listed in annex A does not exceed their assigned amounts.

Marine Biodiversity

One of the primary aims of integrated coastal zone management is to maintain a high biodiversity conservation level sustainably.[22] The rapid development of the economy results in the over-exploitation of natural resources, climatic change, eco-system function degradation, and species declining even extinction. Marine biological diversity is an essential component of global biodiversity. Although much attention has been given to change in biodiversity in the terrestrial environment, changes in the marine environment have certainly not gone unnoticed. The marine realm provides a wide variety of goods and services to society. A series of diverse eco-systems

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19 *Ibid*

20 O. Hoegh- Guldberg and J.F. Bruno, "The Impact of Climatic Change on the World's Marine Ecosystem", (2010) 328 science p. 1523

21 UN General Assembly, Ocean and the Law of the sea, Report of the Secretary General. A/68/71/Add.1, 9th September 2013, p 30 para 134.

22 Shen, Jinyu, et al. "Relationship between Marine Biodiversity Conservation and Poverty Alleviation in the Strategies of Rural Development in China." Journal of coastal Research, 2015, pp. 781-785. JESTOR, WWW.jestor.org/stable/ 43265424. Accessed 3 November 2020.

like wetlands, mangroves, coral reefs, and seagrass beds provide necessary breeding, nursing, and feeding grounds for marine life and support a wide range of other functions.[23] The state of the marine environment depends considerably on activities carried out on land. The marine environment's primary source of pollution is human activity in coastal areas and inland regions.[24] Most of the pollutants that emerge from diffuse and point sources finally end up in coastal and marine waters, including the sea's deepest parts. Marine biodiversity is sensitive to exploitation, pollution, and habitat destruction. Enormous and drastic human activity is the main destructive factor of biodiversity, and biodiversity conservation is to preserve and restore biodiversity through limits and social activities adjustments.

Sea-Level Rise

Climatic change is one of the greatest threats to human lives and livelihoods in the coastal region worldwide. It will significantly aggravate existing hazards such as flooding from cyclones and storm surges. Other climate-included risks, including sea-level rise, salinity intrusion, drought, and temperature and rainfall variations, are becoming serious threats to food, water, energy, and health security for humankind.[25] The impacts of coastal erosion and sea flooding in densely populated and infrastructure-rich coastal cities have received a lot of attention from the climate change impact literature. High concentrations of human settlements characterize coastal areas: population density is, on average, three times the global mean.[26] The coastal countries of the Indian Ocean region from East Africa to Southeast Asia are highly vulnerable to climate change. Because of their geographical location and topography, many endangered. For example, Bangladesh and Vietnam are the most substantially affected countries globally because of the

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[23] Puthucherril, Tony George. "Protecting the marine environment: understanding the role of international environmental law and policy". Journal of the Indian Law Institute, Vol.57, no.1, 2015, pp.48-91. JESTOR, WWW.jestor.org/stable/ 43265424. Accessed 9 November 2020.

[24] U.N. Secretary General, Ocean and the Law of the Sea Rep. of the Secretary-General, 18 U.N. Doc. A/60/63/Add.2 (Nov,1,2020), available at http// dacess-dds-ny.un.org/doc/UNDOC/GEN/NO5/461/37/PDF/NO546137.pdf?

[25] Rabbani, Golam, et al. Climate Change and Sea level Rise: issues and challenges for coastal communities in the Indian Ocean Region. Edited by David Michel and Amit Pandya, Stimson Center, 2010, pp. 17-30, Coastal Zones and Climate Change, WWW. Jestor.org/Stable/resrep10902.8. Accessed 30 June 2020.

[26] Bosello, Francesco, and Enrica De Cian.Climate Change, Sea Level Rise, and Coastal Disasters: A Review of Modeling Practices. Fondazione Eni Mattei (FEEM), 2013, www.jestor.org/stable/resrep01006. Accessed 30 June 2020.

large portion of their populations living in significant river deltas exposed to sea-level rise.[27]

As a sea-level rise, saline water will intrude directly into rivers and streams, advancing not only as a function of the water level but also according to river discharge changes that may result from climate change. Saline intrusion from sea level rise will degrade water quality in coastal rivers, lakes, ponds, and aquifers in different regions. This degradation will put stress on the existing drinking water sources, which is already a problem affecting many developed and developing countries.

Human Health

Humans have been dependent on the seas and oceans for many millennia and have used the coastal waters as prehistoric food and expansion resources around the planet. However, the oceans and coastal seas are a double-edged sword in interactions with human health.[28] The increasing coastal population worldwide is outpacing the environment's capacity to assimilate human and industrial wastes. Point-source discharges of untreated wastewater and sewage and industrial and agricultural effluents continue to pollute an estuarine and coastal system.[29] Coastal population and population change rates are essential when focusing on the question of coastal development and human health. The overall global burden of human disease caused by sewage pollution of coastal waters has been estimated at 4 million lost people –years annually.[30]

Cultural Assets

The conservation, protection, and management of indigenous, ecological, and sacred sites have, in recent times, received global attention because of the tremendous potential they hold for sustainable livelihoods,

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[27] The Ocean Act 2000

[28] Moore, Michael., et al. "Ocean and Human Health(OHH): A European Perspective from the Marine Board of the European Science Foundation 9 Marine Board-ESF). "Microbial Ecology, Vol. 65, no. 4, 2013, pp. 889-900. JESTOR, www.jstor.org/stable/23469580. Accessed 30 June 2020.

[29] Bowen, Robert E., et al. "The Human Development and Resources Use in the Coastal Zone: Influences on Human Health." Oceanography, Vol. 19, no. 2, 2006, pp. 62-66. JESTOR, www.jstor.org/stable/43925816. Accessed 30 June 2020.

[30] Sandifer, Paul A. et al. "Guest Editorial: The Oceans and Human Health." Environment Health Perspectives, Vol. 112, no. 8, 2004, pp. A454-A455. JESTOR, www.jstor.org/stable/3435825. Accessed 30 June 2020.

recreation, and scientific research. The maintenance of these sites is, invariably, linked to the preservation of local cultures because of mutual interactions and interdependence between local people and their natural environment.[31]

Conclusion

The marine environment is playing a crucial role in the economy and lifestyle of the region's countries. The atmosphere is already under stress in many countries and will have to bear the major brunt of development. Domestic wastewaters' discharge through marine outfalls is commonly used to take advantage of the coastal environment's extensive assimilation capacity. If biodegradable effluents are adequately mixed and dispersed in the receiving environment, dilution could be evaluated as a sustainable disposal option. Deterioration of environmental quality in the beaches requires remedial measures to improve recreation value. The spatial study revealed a dire need for suggestive measures to mitigate coastal and creeks water pollution and enhance water quality. Measures include the identification of non-point sources and improvement in the existing wastewater collection system. An appropriate treatment level and proper disposal may achieve designated water quality for the coastal and creek water environment.

[31] Sarfo-Mensah, Paul, et al. "Environmental Conservation and Preservation of Cultural Heritage: Assets for Tourism Development in the Akyem Abuakwa Traditional Area of Ghana." Worldviews, Vol.18, no. 1, 2014, pp.30-53. JESTOR, www.jestor.org/stable/43809503. Accessed on 30 June 2020.

CONCEPTUALISATION OF VICTIMOLOGY IN INDIA: PERSPECTIVE BEYOND FRONTIER

-Ms. Sofia Khatun*

Introduction

Victimology is one of the specific branches of criminology that studies the relationship between the offender and the injured party that examines the nature and causes of the consequences suffered. In case of any occurrence of a crime, there are several people involved that include the offender, victims, and the investigating officers of the crime. The concept has a relationship implied with the media, institutions, social groups, social movements, and media. Victims are the persons who have suffered the harm as a consequence of the situation, collectively or individually. Victims suffer from the injury that might be physical or mental, economic loss, financial suffering, in the present situation, the victims or accused of the crime is the only witness for the prosecution. At the time of criminal proceedings, the accused has several rights, unlike the victim who has no right to protect her or his interest. Several countries have implemented certain programs for the protection of the victims. Various types of Victimology include sexual harassment, rape, sexual touching, stalking, theft, physical assault, domestic violence, the threat of harm, and many more.[1] Ever since the dawn of civilization as we know it, victimization has been an existing concept, though it hadn't been recognized as a distinct feature of a human society nor been considered as an independent discipline of criminal studies or a cross-ideology of social-cognitive science.

European Experience

Europe developed victim policies in terms of Victimology that needs to be against the justice of the crime in question. There are three crucial legal systems in Europe catering to the French-based system, the German System, and the common law system. There are several measures taken by Europe against criminology and Victimology. One such measure is adopted in a wide manner in Europe that is the victims are subjected to the state suspension after the crime. Several services for delivering the victim are also established and are a significant trend in Europe. "Victim Support" is one of the well-organized schemes that are most supported and active in Wales, England, and North Ireland. On the subject of crime victims, Europe has several establishments, developments, and arguments concerning the position. There

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* Advocate

1 Flynn, M., & Hall, M. (2017). The case for a victimology of nonhuman animal harms. *Contemporary justice review*, *20*(3), 299-318.

are two kinds of legal systems on the rights of victims formulated by the European Council. The European Ministers of Justice adopted several recommendations based on the victim's position that includes:

- Justice that is child friendly.
- Protecting women against violence.
- Protecting the victims from terrorism acts.
- Assisting the crime victims.
- Compensating the victims of the crime that are violent.
- Actions against human trafficking.
- Protecting children against sexual abuse and sexual exploitation.

European Convention of Human Rights

ECHR is the convention that protects the human or citizen rights of the people who belong to the countries under the council of Europe. There are a total of 47 members in the council of state of which the whole title is Convention of Protecting the Fundamental Freedoms and Rights of the Human. ECRH is brought by the act of Human Rights into British Law.[2] The Human Rights Act has two specific parts: the first one refers to the ways these rights are enforced and applied. The second one contains the most number of rights affecting the decision making by the public authority and the law-making.

Several Directives are adopted by the European Parliament for the establishment of protection and support for the victims of the crime, minimum standards for the rights, and replacing the decision making frameworks of the council. The changes made in the decision-making framework of the council are the support, protection, and access information and the basic rights in the procedure of the criminal proceedings. The directives implemented are concerned solely for the cross border transmission in the compensation based on the state. The main theme in making the framework decision is to follow the international consensus that is visible in other legal instruments that are international. The basic rights involved in it for crime victims are: to receive all the information concerned with the progress of the case, providing information to the respective officials relating to the offender in the decision-making process, protecting the privacy of the victims and physical safety,

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[2] Fredman, S. (2016). Emerging from the shadows: Substantive equality and article 14 of the European convention on human rights. Human Rights Law Review, 16(2), 273-301.

receiving support from the victims and participating in the mediation process that is needed for any offense.

The European Union's development of the victim's rights is more enhanced with the adoption of the five-year plan for home affairs and justice and the Treaty of Lisbon[3]. The Lisbon Treaty particularly mentions the crime victims' rights concerning the title of "Area of Security, Freedom, and Justice". Almost all the members of the state grant the victims the right to perceive all the information. The victims have the right to get information about the investigation of police of the offense and the suspected prosecution. The information in the last stage of the criminal procedure is often not delivered to the victims like that of the release of the offender. In case the victims are at a high risk of repetitive victimization then the information about the release of the offender is not released to the victim that might cause a problem[4]. Victims of the violence are also eligible for compensation in return for the injury that can be either from the side of the state or the European Union's Perpetrators from 27 different countries. The victims also have the right to submit a statement on the victim's impact in the countries under the European Union. The questioning done to the victims should be limited and minimum taking in concern the victim's point of view. This will be minimum in particular if the victims are vulnerable, young, and are the victims of sexual and domestic violence. Special treatments need to be given to vulnerable victims like that of a child or female. Minority or very few members of the European Union provide legal assistance to the victims because of their victimization.

American Experience

In the late 1960s, America witnessed an interest in Victimology because of increased crimes that were a matter of concern for them. In the year 1966, the President's Commission on the administration of Justice and Law Enforcement was made to conduct surveys on victimization rates.

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[3] Bevir, M., & Phillips, R. (2017). EU democracy and the Treaty of Lisbon. Comparative European Politics, 15(5), 705-728.

[4] Kuijer, M. (2020). The challenging relationship between the European Convention on Human Rights and the EU legal order: consequences of a delayed accession. The International Journal of Human Rights, 24(7), 998-1010.

The Women's Movement

The reasons catering to the lack of power, support, and influence of women saw the poor response of criminal justice to women victimized for domestic violence and sexual assault. The newly emerged feminists of America saw the need to provide distinctive care to the victims of domestic violence and rape[5]. The movement is also referred to as the women liberation right is the social movement for equal legal rights specified to women.

Criminal Justice System

For the enforcement of a legal code, an organization named the criminal justice system is established in America. The organization is structured with three branches that include Police, courts, and the correction systems. There is no national force of police that is unified in the United States[6]. The court is the system that decides the crimes based on the laws where there are three levels:

- Trial court
- Appellate Court
- State supreme courts.

The correction system is the prison system that supervises the offenders or the criminals convicted, arrested, and sentenced for any offensive task.

In the case of the United States in 1973 a movement was created as the Victim's Right Movement in modern crime. The movement created an independent role of participation for the crime victims in the proceedings of criminal justice. The movement is attempted in several ways like in federal congress and state legislatures. In the federal system, the congress approved several pieces in the legislation of right's in the victims of a crime, the witness and victim protection act and also passed several laws giving a greater and better legislative recognition to the crime victim's rights. There are several rights passed under the movement of the victim's rights:

- Right to privacy.
- Right to information.
- The right that seeks the victim to be present at the time of proceedings of criminal justice.

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5 Banaszak, L. A., & Ondercin, H. L. (2016). Public opinion as a movement outcome: The case of the US women's movement. *Mobilization: An International Quarterly*, *21*(3), 361-378.

6 Shelden, R. G., & Vasiliev, P. V. (2017). *Controlling the dangerous classes: A history of criminal justice in America*. Waveland Press.

- The right to opportunity and notice that seeks to hear the important proceedings of criminal justice.
- Right to protection
- The right to gain recompense financially for all the losses suffered from the outcomes of a crime in the form of reparations or compensation.

The movement of crime victim rights has become an important element in the community of the United States for criminal and social justice services. The state needs to provide reimbursements in the financial aspect to the victims of a crime for the losses. Many of the compensation programs were in the form of welfare programs that provided help to the victims in need. Sexual victimization does occur in the jails and prisons of the United States as well, that is sexual harassment also occurs behind the bars. It is also noted that the women who are being harassed are not sexually assaulted by the men only but are three times more harassed by the women in their workplace. There are many risks faced by Americans in terms of sexual minorities[7]. The United States often confines people disproportionately based on people who are mentally ill, black, having low income putting all these people at the risk of being abused. The young people or juveniles often face the risk of being victimized in terms of sexual abuse. The victim is now provided the right to participate at the time of trial but does not offer the victim to actively participate in the criminal justice system. Under the Witness Protection Act of 1982 in the United States of America, the victims need to be consulted in the process of plea bargaining.

Indian Experience

The system of criminal justice in India is incorporated from the Criminal Justice System of British. Through the judgments of different courts of the judiciary system like the high court's and the Supreme Court accepts various concepts of preventing the treatment and crime along with rehabilitating the criminals. There are no rights provided to the victims under the system of criminal justice and the victims are treated as the mere witnesses. The state takes the whole responsibility to punish and prosecute the offenders. The courts and the legislature both have played an important role in growing the concept of Victimology in the system of Criminal Justice in India. Even the Non-Government Organizations (NGO's) also played an important role in Victimology growth in the Indian Society. A workshop was

[7] Bevir, M., & Phillips, R. (2017). EU democracy and the Treaty of Lisbon. *Comparative European Politics*, *15*(5), 705-728.

organized by the Indian Society of Victimology for drafting a bill of Victim Assistance. The bill drafted for the launch of a scheme to compensate the victims of the crime and the society is still fighting to prevent the victims of crime. India , being a sovereign country, has been a signatory to many International Conventions and has ratified major International Conventions proposed by the International Labor Organization, which governs the matters of Forced Labor and yet the persistence of male dominance puts the validity of such conventions into question.

Sexual harassment in work places constitutes a major and a sensitive form of violence manifested against women. Authors, in fact hold sexual harassment of women as a very challenging occupational hazard. The major root cause of gender related problems in the society are because of the misconceived concepts of socio-centric society and an ego-centric social identity. According to Hofstede, socio-centric cultures give rise to social feeling of shame (hence compelling a woman to not raise her voice against social –gender injustice, majorly in an Indian society) which cannot be felt in the absence of social relations. Hence, it can be inferred that victimization of women is also majorly because of conflict of these two social identities.

The justice system of India is designed the way that minimizes various obstacles that are faced by the victims. The victims need to have access to the system of justice that will include the customary justice, juvenile proceedings, civil and administrative proceedings, and the international tribunals[8]. The victims need support on behalf of their effort to participate in the system of justice through indirect or direct means. The information should be provided to them on the timings of decision and notification. There is a provision of getting full information on the processes and procedures involved. The victims should also be supported at times when there is a need for the victim's presence at occasional events and get the opportunity to hear.

The protection of the privacy and safety of the victims is also considered necessary. Some certain practices and laws seek to reduce the risk of the victims. In India, Police are the first-hand agency with whom the victims come into contact and talk about the victimization. As the first encounter of the victims is with the police, the treatment they get from the police will determine the whole attitude of the victim towards the criminal

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[8] Valan, M. L. (2020). Victimology of Sexual Harassment on Public Transportation: Evidence from India. *Journal of Victimology and Victim Justice*, *3*(1), 24-37.

proceedings. Under the justice of victims, the police are still not able to meet the expectations of the victims concerning the crime or the incident. There are several committees and commissions of justice in India:

The Law Commission of India, 1996: the report in the year 1996 stated that the principles to assist the victims must be provided by the state itself from its funds. It is applicable in case if the offender cannot be traced but the victim is identifiable, in the cases of acquittals and when the offense is already proved.

There is a committee named Justice Malimath that has several recommendations for improving the position of the crime victims. In case the victim is dead, the legal representatives of the victim have the right to bring suit against in all the criminal proceedings in which the charges are more than 7 years[9]. The victim has the right to get himself/herself presented by any advocate according to his or her choices. In case the victim is unable to afford a lawyer then the state needs to provide the cost of employing a lawyer for the victim. The victim needs to have the right to choose an appeal on his or her preference against any order passed by the court that has adverse effects. The order passed in acquitting the accused that is sentencing the accused with less offense and imposing a conviction that is inadequate and also grants inadequate compensation.

Various amendments are made in the code of criminal procedure in the year 208 for bringing different provisions that are victim-friendly. In Section 2 (WA), the amendment included the definition of the victim that refers to a person suffering an injury or loss that is caused because of an omission or act, the reason for which the accused person is charged. Section 24 (8) provides the victim with the right to engage his or her lawyer according to the choice for assisting the prosecution. Section 157 provides the provision that if any offense is related to a rape then the victim has the choice of getting his or her words recorded in the residence or any place of his or her own choice[10]. A woman police officer has to be present during the time of record along with the presence of her guardians or parents, near relatives or any social worker from the locality. Section 357 (3) and (1) states that the trial court has the

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9 Saikumar,R.(2016)Negotiating Constitutionalism and Democracy: The 262nd Report of the Law Commission of India on Death Penalty *Socio-Legal Rev.*,*12*, 81

10 Arora,D. (2019). Does Public Policy Demand Change in Criminal Procedure Laws in India:A Critique. *Journal of the Gujarat Research Society*,*21*(16),1303-1311

power to award compensation to the victims in the criminal offense that is vested in the Provisional Court and Appellate Court.

The compensation might be in the form of cost or welfare concerning the injury or damage caused because of monetary loss or death due to property destruction or theft. With the coordination of the central government, all the state governments should prepare a scheme for giving funds in providing compensation to the victims who all have suffered from the injury or loss as an outcome of the crime and when there is need for rehabilitation. Section 372 provides the victim the right to appeal privately against any inadequacy of punishment that is available only on the ground if the accused is convicted for less offense and given inadequate compensation. The act of criminal law was also amended in the year 2013 that deals with the rape laws.

Legal Framework

The impact of victimization is severe in India as 1 out of every 4 citizens is reported to be victims of such events of victimization. Through the past century, the trends in committing the crimes of victimization were measured by the reports submitted by police. However, nowadays, the trends in committing the crimes of victimization are measured also by the assistance of surveys done on the civilian population. Due to increasing trends in crimes of victimization, the legal framework set against these crimes is made strict by the country's judiciary system with the help of the handbook from the United Nations on justice to the victims of such crimes. The United Nations has set a declaration based on fundamental principles on bringing justice to victims.[11] The handbook of United Nations helps to divide the impacts of the crimes of victimization on the affected people into the categories of:

- Social cost and psychological injury
- Financial and physical impact of the crime, and
- Impact of victimization by the society and the criminal justice system which is also known as secondary victimization.

The criminal justice system of India was formed by the influence of the criminal justice system set by the Britishers and the difference among the powers by the Executive, Legislature and Judiciary systems is highly visible. The judiciary system of India is highly independent which also has a free press. India's penal philosophy is based on the concept of crime prevention which is followed by criminals' rehabilitation and treatment. This philosophy

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[11] LEGAL SERVICE INDIA, (2020) Victims, victimization and Victimology

of Indian Penal System can be observed in various judgments provided by the High Courts and the Supreme Court of India. The victims seeking justice under the Indian Criminal Justice System do not have any kind of rights and the country is fully responsible for providing justice by prosecuting and punishing the criminals.

The Indian System of Criminal Justice consists of 4 major auxiliary systems, which are:

- ***Law Enforcement*** which is carried out by the Police,
- ***State Legislatures*** and ***Union Parliament Legislatures***,
- ***Juvenile and adult correctional establishments*** which is done by several Jails and correctional homes, non-institutional probational establishments, and
- Courts where the ***Adjudications*** are done.

Although there is no presence of separate laws for the victims of crimes, the only ray of sunshine is that the justice to the victims is rendered by assertive orders and actions of Apex courts[12]. In addition to that, there are many Commissions and Committees present at the national level who have strictly advocated and reiterated for the rights and the laws for the victims. There are also provisions present for the protection and compensation to the victims of crimes but the major doubt lies in the question that would be sufficient for the victim to recover from the physical and mental trauma of the crime.

Role of Courts

The victims of criminal offenses are considered as the forgotten element of the Indian System of criminal Justice. The major attention was drawn fundamentally to the offenders and the crime but very little amount of attention is given to the victim which can be stated as the consequence of the crime. The victims of acts of crime or by any violation of human rights, which is irrespective of the victim's legal or economic status, have every right to receive compensation associated with the injury that is caused by the commencement of the crime. These compensations can be followed through criminal procedures, civil administrative and also can be awarded by the damages on materials or non-materials[13]. The court provides aid by compensating the victims through proceedings followed by Article 226 or 32

[12] LEGAL SERVICE INDIA, (2020) Victims, victimization and Victimology

[13] MAGZSTAR, (2020) Analysis of Concepts of Victimology Under Indian Legal System

of the Indian constitution by seeking protection or implementation of the fundamental rights present in the constitution.

Although the evolution of Victimology is majorly forced by the Judicial system of India the legislature was also not ignorant about the development of the issue. As the evidence rules which are provided in *the section of 152 and 151, the evidence act of India, of 1842*, is enforced with the protection of the witnesses and victims from being interrogated scandalous, indecent, offensive questions, and other questions that are focused on insulting or annoying them. In addition to that, the *section 312, the Criminal Procedure Code of 1973* which provides the criminal courts to order payment of justified expenses that are incurred to the witness or the victims for attending the court[14]. The witnesses and victims are also provided with few protective measures such as suppression of identity, the holding of a trial, and many more by judicial activism.

There is also a provision of trials through the camera which comes helpful while providing testimony of the victim or the witness for the potentiality of being bugged in the hostile atmosphere of the court. The suppression of the Identity of both witnesses and the victim is highly essential in protecting and securing the individual's privacy. The event of evidence the recording is also promoted by the influence and support of the Supreme Court of India. Instead of the presence of laws and codes especially for the witnesses and the victims, there is the presence of various legislations that are focused on the protection of the right of the witness and the victims. The section of 195-A of Indian Penal Code has legislations of protecting the witnesses and the victims from any person who is induced or threatened to provide misleading evidence as a non-bail able and cognizable offense and provides a punishment of a fine or 7 years of imprisonment or both.

Under the *1973's Criminal Procedure Code, sec 190, 154(2).160, 439, and 406* are also associated with the protection of victims and the witnesses of the crime. In *section 357 of the Criminal Procedure Code, there are subsections of (4), (3), and (1)* gives power to the victim and witnesses to have the privilege of trial and the provisional and appellate court to provide compensation to the witness and the victims. *Article 21 and 14 of the Constitution of India* is efficient enough to protect the witness and the victim

[14] Mate, M. (2016). Globalization, rights, and judicial review in the Supreme Court of India. *Pac. Rim L. & Pol'y J.*, *25*, 643.

of crimes. The *Article 51-A of the Constitution of India* enforces the fundamental duty on the citizens of India for providing protection and improvisation to the natural surrounding environment. *Article 41 of the Constitution of India* grants the ability of assistance by the Public for society's valuable sections.

Role of National Human Rights Commission (NHRC), India

The National Human Rights Commission (NHRC), India is founded by an Act of Parliament which comes under the act of Protection of Human Rights, of 1993 with the focus of protecting and promoting human rights. The activities of the commission as described in Section *12* of the act and this is distant from the interrogation into the complaints of disobeying or neglecting human rights while preventing those illegal activities. The NHRC also observes and studies international instruments and agreements on the ground of Human rights and provides recommendations to their effective and efficient implementation by the government. In addition to that, the NHRC is also accountable for spreading awareness about Human Rights within the population of India[15]. The NHRC encourages every effort of any stakeholders in the area of human rights not only at a national level but also internationally. The NHRC, India is one of a kind among the other institutes of National human rights as the chairperson of this institute is the country's former Chief Justice.

Section 2(1) (d) of the act of Human Rights Protection is responsible for defining the human rights as the rights associated with liberty, life, dignity, and equality of any individual. This is assured by the Indian constitution or embodying international Covenants and is enforceable by the Indian Courts. The NHRC, India majorly plays an active role in the coordination of other institutes of national human rights in the world to increase the awareness in the perspective of Human Rights. The NHRC, India has also proudly hosted the delegates from the bodies of United Nations and other NHRC's as well as the participants of lawyers, civil society, and activists from the social and political background from every other country.

The NHRC functions to enquire about the violations of the human rights or decline meant of its own or by a petition submitted by an affected body. The NHRC is also responsible for inquiring about any negligence or

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[15] National Human Rights Commission, India, (2020) Vision & Mission https://nhrc.nic.in/about-us/vision-and-mission

disrobement of human rights done by a servant of Public and helps in the prevention of those violations in the future. The NHRC is also enforced with intervention with any proceedings or trials which are related to the violation of human rights and is pending to a court with the permission from the court[16]. The NHRC, India also has the permission for reviewing the safeguards which are developed for protecting the human rights that are in the Indian Constitution or any of the present law. The NHRC, India also has the provisions to provide suggestions to take effective measures by the state and central governments to be able to implement the respective measures effectively.

The NHRC, India is enabled with promotions and undertakings of the researches that are done in the field of Human rights. The commission also functions to spread the idea of human rights and helps in the promotion of the spreading of the awareness for the protection of these rights in the multiple levels in the society[17]. So with the enactment of these functions by the NHRC, India, the perspective of victimization is also evaluated as in the cases of victimization of any individual the fundamental laws and principles of Human rights are being violated. The victimization of women in workplaces not only results in low standards of perceived organizational structure and perceived organizational justice, but also leads to the developments of bigger social ailments, such as large scale ill mental and physical health of women. It is hence, not just a matter of social injustice or gender discrimination, but what also need to be addressed are the manifestations of such a failure of social system. The modern society is embellished by the inception of Information Technology as an independent discipline, and its significance is exemplified by the rate of employment opportunities the Information Technology sector provides, especially in a developing country like India. Despite having many waved the psychological and the social stability of the population. Hence there is a need to strategize better adaptations, recommendations followed by its implementation which must be kept under surveillance.

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[16] Ansari, S. (2017). Modernization and Advances in Crime Measurement and Crime Classification in India: A Critical Review. In *Crime, Criminal Justice, and the Evolving Science of Criminology in South Asia* (pp. 81-108). Palgrave Macmillan, London.

[17] Thakre, A., & Jaishankar, K. (2018). Whither Indian Criminology?. *International Journal of Criminal Justice Sciences*, *13*(2), 247-263.

Conclusion

There is increase in crime and violence against women even after the presence of the concept of gender equality. Several policies are made for ensuring equal rights among all the genders and protecting them from the risk of getting sexually assaulted or harassed. The universal declaration of human rights aims to declare that everyone has the right to liberty, life, and security. There are a certain number of recommendations for protecting the victims by providing justice that is child friendly, taking actions against the trafficking of women, and many more. There are women's rights movements providing security to all the women who are sexually harassed, exploited and assaulted. There are several rights provided under the right of the victim in a crime that gives them certain benefits in securing their position. The victims are given the right to appeal in court against the offender to seek justice against the crime. The right is provided to the victims of the crime to get all the relevant information of the proceedings in the justice of the court. Special rights are provided to the rape victims during the criminal procedures to be carried out. In the view of the increase of violence and crimes against women, bereft of the real practical essence of gender equality, many International Organizations have ventured into the making of the policy prescriptions which carry the vision of ensuring equal rights for both the genders and also guards the conventionally recognized weaker sex from submissive intentions and denial of their rights with gender as the main contributing factor to such a motivation.

LEGISLATIVE RELATIONS BETWEEN THE UNION AND THE STATES - AN ANALYSIS

Nishant Kumar Jilova*

"Federation means the establishment of a Dual Polity. The Draft Constitution is, Federal Constitution inasmuch as it establishes what may be called a Dual Polity. This Dual Polity under the proposed Constitution will consist of the Union at the Centre and the States at the periphery each endowed with sovereign powers to be exercised in the field assigned to them respectively by the Constitution."[1]

Introduction

India is the Seventh largest country in the world. The Indian Constitution though federal in form but is not similar to the Constitution of the United States of America or Australia. Indian Constitution is described as quasi-federal. A unitary form of government is unsuited to a vast country like India with different culture, religion and languages. Therefore, some kind of federalism was necessary. Hence the framers of the Constitution created an instrument of governance which provides for federalism and a Parliamentary system of Government[2]. "*India, that is Bharat, shall be a Union of State*[3]*s*". The word "Union of States" also indicate that the Indian Union is federal. The union and the states derive their authority from the constitution which divided all powers - legislative, executive and financial as between them. The result is that the states are not delegates of the union, but they are autonomous within their own spheres as allotted by the constitution.

The framers of the Constitution created a federation where cooperation between the Union and the States is very essential. Thus, the Indian Constitution has created a new norm of federalism and that is the Cooperative Federalism. The Parliament and the State legislatures have plenary powers of legislation. The Union and the States are also equally subjected to the limitations imposed on them by the provisions of the Constitution. One such limitation is the distribution of legislative powers.[4]

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1 Dr. B.R. Ambedkar, On 4th November, 1948, CAD, Vol. VII, p. 33.

2 S.R.Bommai v. Union of India, AIR 1994 SC 1918.

3 Article 1 of the Constitution of India.

4 *Article 245-255 of the Constitution of India.*

Division of Legislative Powers

The Indian Constitution specified two-fold division of Legislative powers between the Union and the States:

I. Territorial Jurisdiction

II. Subject Matter Jurisdiction

I. Territorial Jurisdiction - Subject to the provisions of this constitution, the Parliament may make laws for the whole or any part of the territory of India[5].The Parliament of India also possess the power of 'extra-territorial legislation which no state legislature possesses[6]. That means the laws made by Parliament will govern not only the persons and property within the territory of India but also the Indian subjects resident and this property situated anywhere in the world. In fact, the Parliament may make laws for the whole or any part of the territory of India, and the legislature of a State may make laws for the whole or any part of the State but the legislative powers of the Parliament and the legislature is subject to the provisions of this Constitution[7], such as-

(1) The scheme of the distribution of powers,
(2) Fundamental Rights and
(3) The other provisions of the Constitution.

The States legislature under our Constitution shall have no extra territorial powers.[8] In the absence of such Territorial nexus, a state legislation which deals with a subject-matter lying outside its territorial limits must be held ultra-vires.[9] Further in case of Wallace *v. Income-Tax Commissioner, Bombay*,[10] it had been held by Privy Council that a company which was registered in England was a partner in India. The Income-tax Authorities sought to tax the entire income made by the company. The Privy Council applied the doctrine of territorial nexus and held that the levy of tax valid. In another case of Tata *Iron and Steel Company v. State of Bihar*[11], the Supreme Court applied the theory of territorial nexus to sales-tax laws.

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5 *Article 245 (1) of the Constitution of India.*

6 *Article 245 (2) of the Constitution of India.*

7 *Raja Ram Pal v.Hon'ble Speaker, Lok Sabha(2007) 3 SCC 184.*

8 *State of Bombay v. Chamarbaugwala, AIR 1957 SC 699.*

9 *Ibid.*

10 *AIR 1948 PC 118.*

11 *AIR 1958 SC 452.*

The Parliament can pass a law having extraterritorial application. However such laws must always have some nexus with India[12]As regard to territorial application, it is provided that laws of Parliament alone will have extraterritorial application. This means that the laws of Parliament will be applicable to the whole country and also to the Indians who are outside to the India, if such Indian are subject to the Indian laws. Laws passed by State legislatures will have no extraterritorial application, the validity of such laws will depend upon "the sufficiency of the purpose" for which such an application is meant. If such a territorial nexus cannot be established, the State law will be Ultra-Vires[13]. The doctrine of territorial nexus was evolved by Privy Council in *Wallace Bros and Co. Ltd. v. Income Tax Commissioner, Bombay*[14] in this case a company was registered in England and appointed an agent in Bombay. Through that agent the company carries on its business within the territory of India. In a year, the company out of its total profit of Rs.2.4 million, earned Rs.1.7 million by carrying its business within the territory of India. The Indian tax authorities sought to tax the entire income of the company. The company contended that the Indian Income Tax Act, 1939 could not be applied to it as it was subject of the English Laws. The Privy Council however upheld the levy of tax by applying the doctrine of territorial nexus[15]. The doctrine explains that it is not essential that the object to which the law is applied should be physically located within the boundaries of the State making the laws. It is enough if there is sufficient territorial nexus between the object and the State making the law.[16]

II. Subject Matter Jurisdiction - In a federal system of governance a distribution of powers between Centre and States is an essential requirement. The nature of distribution depends upon the local and political background in each Country. In America, the sovereign states did not like complete subordination to the Central government. Hence, they believed in entrusting subjects of common interest to the Central government, while retaining the rest with them. Australia also followed the American pattern of only one enumeration of powers. In Canada, there is

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12 Electronics Corpn. of India ltd. v. CIT,AIR 1989 SC 1707.

13 T.K.Tope's," Constitutional law of India", Eastern Book Company,3rd Ed.2010 at pg.894.

14 AIR 1948 PC 118.

15 Prof.Naresh Kumar, "Constitutional Law of India", Allahabad Law Agency,4th Ed.pg.624.

16 Governor General v. Raleigh Investment Co., AIR 1944 FC 51.

double enumeration of powers, i.e. federal and provincial leaving the residue for the Centre.

The Constitution of India followed the method of the Government of India Act, 1935 and divides the powers between the Centre and the States in three Lists-

(1) The Federal List,
(2) The State List and
(3) The Concurrent List.

Article 246 provides about subject matter of laws made by Parliament may make laws with respect to the matters contained in Union List and a State Legislature may make laws with respect to the matters contained in the State List. As regards to the matters contained in the Concurrent List, both Union Parliament and the State Legislatures are vested with Concurrent Powers of legislation. Article 246 read with Seventh Schedule of the Constitution says that-

(1) Notwithstanding anything in clauses (2) and (3), Parliament has exclusive power to make laws with respect to any of the matters enumerated in List I in the Seventh Schedule (in this Constitution referred to as the "**Union List**").

(2) Notwithstanding anything in clause (3), Parliament, and, subject to clause (1), the Legislature of any State also, have power to make laws with respect to any of the matters enumerated in List III in the Seventh Schedule (in this Constitution referred to as the "**Concurrent List**").

(3) Subject to clauses (1) and (2), the Legislature of any State has exclusive power to make laws for such State or any part thereof with respect to any of the matters enumerated in List II in the Seventh Schedule (in this Constitution referred to as the **"State List**").

(4) Parliament has power to make laws with respect to any matter for any part of the territory of India not included in a State notwithstanding that such matter is a matter enumerated in the State List. Such as:

(i) The Union List: The Union List consists of 97 subjects over which the union parliament shall have exclusive power of legislation. The Subjects mentioned in the Union List are of national importance i.e. defence and foreign affairs, banking currency and coinage, union duties and taxes etc. But Entry 33 was deleted by the Constitution (7th Amendment) Act, 1956 and Entries 2-A, 92-A and 92-C were added by various amendments later on.

(ii) The State List: The State List consists of 66 subjects over which the states legislature have exclusive power to make laws. The Subjects mentioned in the State List are of local or regional importance, such as public order, police, public health, agriculture, sanitation, forests, fisheries and education etc. But Entry 19, 20, 29 and 36 were deleted by various constitutional amendments.

(iii) Concurrent List: The Concurrent List includes 47 subjects over which both the union parliament and the states legislature can make laws but in case of conflict between the Central Law and the State Law, the Central Law will prevail over the State law. Entry 11-A, 17-A, 17-B, 20-A and 33-A were deleted added by various Constitutional amendments. The purpose of adding the List to the Constitution was to secure uniformity in the main principles of law throughout the country.

In case of any inevitable conflict between Union and the State powers, the Union powers as enumerated in List 1 shall prevail over the State powers as enumerated in List II and List III[17] and in case of overlapping between III and II, the former shall prevail.[18] But the Principle of federal supremacy laid down in Article 246(1) of the constitution cannot be resorted to unless there is an irreconcilable conflict between Entries in the Union and State Lists. In the case of seeming conflict between Entries in the two Lists, the entries should be read together without giving a narrow or restricted sense to either of them. Secondly, an attempt should be made to see whether the two Entries cannot be reconciled so as to avoid a conflict of jurisdiction. This is called the doctrine of *Harmonious interpretation*[19]. Thirdly, no question of conflict between two Lists will arise if the impugned legislation, by the application of Doctrine of *Pith and Substance*[20] appears to fall exclusively under one List and the encroachment upon another List is only incidental[21].

The Residuary Powers of Legislation

Article 248 vests the residuary powers in the Parliament it says that, Parliament has exclusive power to make any law with respect to any matter not enumerated in the concurrent List or State List and such power shall include the power of making any law imposing a tax not mentioned in either

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17 *Indu Bhushan v. Rama Sundari, AIR 1970 SC 235*

18 *Subramaniyan v. Muttuswami, AIR 1941 FC 47.*

19 *State of Bombay v Balsara, 1951 SCR 682.*

20 *S.P.C. v. State of Kerla, AIR 1981 SC 1863 as mentioned in Constitution of India, by Durga Das Basu, at pg.492.*

21 Subramaniyan v. Muttuswami, AIR 1941 FC 47.

of these Lists.[22] This reflects the intention of the framers of our Constitution towards a strong Centre. Another notable thing regarding to residuary powers is that "the final determination as to whether a particular matter falls under the residuary power or not is that of the courts." In case of *Naga People's Movement of Human Rights v. Union of India*[23] Supreme Court held that the Parliament is competent to enact the Armed Forces (Special Powers) Act, 1958 in exercise of the legislative power conferred on it under Entry 2 of List I and Article 248 read with Entry 97 of List I. After the insertion of Entry 2A in List I by 42nd Amendment to the Constitution, the legislative power of Parliament to enact the Central Act would flow from Entry 2A of List I. The Supreme Court further explained the a law providing for "deployment of Armed Forces of Union in aid of the civil power of the State", would not be a law in respect of maintenance of public order falling under Entry I of List II. But, such a Central law would not enable the Armed Forces of the Union to supplant or act as a substitute for the civil power in the State. The Armed Forces of the Union, the Court said, would operate in the State concerned, in co-operation with civil administration.[24]

Parliament's Power to Legislate on State List

The Indian Constitution has purported to incorporate the scheme of distribution of powers in a unique way so as to make the Centre strong enough to meet any emergent or abnormal situations. Though in normal times the distribution of powers must be strictly maintained and neither the State nor the Centre can encroach upon the sphere allotted to the other by the Constitution, yet in certain exceptional circumstances the above system of distribution is either suspended or the powers of the Union Parliament are expected over the subjects mentioned in the State List. These exceptional circumstances are:

- ❖ Power of Parliament to legislate in the National Interest.
- ❖ During the Proclamation Emergency.
- ❖ Agreement between States.
- ❖ For giving effect to Treaties and International Agreements.
- ❖ In case of failure of Constitutional machinery in the States.
- ❖ Repugnancy between Centre Law and a State Law.
- ❖ Accession of new States or Reorganisation of States.

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[22] *Article 248 of the Constitution of India.*

[23] AIR 1998 SC 431.

[24] Prof.Naresh Kumar, "Constitutional Law of India", Allahabad Law Agency,4th Ed.pg.640.

Power of Parliament to legislate in the National Interest: If the Rajya Sabha declared by a resolution supported by not less than two-thirds of the members present and voting that it was necessary or expedient, in the national interest that Parliament should make laws with respect to any matter enumerated in the State List specified in the resolution, it becomes lawful for Parliament to make laws for the whole or any part of the territory of India with respect with that matter during the period the resolution remained in force. Such a resolution remained in force for such period, not exceeding one year, as might be specified therein. The Rajya Sabha, however, could extend the period of such a resolution for a further period of one year from the date on which it would otherwise have ceased to operate. A law made by Parliament, which Parliament would not but for the passing of such resolution by Rajya Sabha have been competent to make, ceased to have any effect on the expiration of a period of six months after the resolution had ceased to be in force, except in respect of things done or omitted to be done before the expiration of that period.[25] This provision enabled the Rajya Sabha which represented the States, to put in the concurrent list any matter that was of local concern but had assumed national importance. The Rajya Sabha could do so anytime, emergency or not emergency.

During Proclamation of Emergency: The Parliament shall have the power to make a law on any item of the State List in case of a proclamation of emergency is in operation[26]. Such a law shall apply to the whole country or any part thereof in the case of National Emergency[27] to any state under President's Rule[28]or under Financial Emergency[29] . The laws of the state or states shall remain inoperative during this period to the extent of being repugnant to the law of the centre[30].

Agreement between States: In case, the Legislatures of two or more states pass a resolution and request the centre to make a law on a certain item of the state List, then it shall be lawful for the Parliament to make a law. Firstly, such a law shall apply to the states which made such a request, though any

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25 Article 249 Clause (1) of the Constitution of India.
26 Article 250 Clause (1) of the Constitution of India.
27 Article 352 of the Constitution of India.
28 Article 356 of the Constitution of India.
29 Article 360 of the Constitution of India.
30 Article 251 of the Constitution of India.

other State may adopt it by passing such a resolution subsequently. Secondly, such a law can be amended or repealed only by the Parliament[31].

For giving effect to Treaties and International Agreements: This provision enables the government of India to implement all commitments under International Law. Treaty-making power has both internal and external aspects. The executives in India has the power to enter into treaties. Parliament shall have the power to legislate with respect to any subject for the purpose of implementing treaties or International agreements and conventions. In other words, the normal distribution of powers will not stand in the way of Parliament to enact legislation for carrying out its International obligations, even though such legislation may be necessary in relation to a state subject[32].

In case of failure of Constitutional machinery in the States: The Parliament is empowered to make laws with respect to all matters in the State List when the Parliament declares that the Government of the State cannot be carried on in accordance with the provisions of the Constitution[33]. The predominance of Parliament was further established by Article 356 and 357 of the Indian Constitution. Article 356 stipulated that, if the President was satisfied that a situation had arisen in which the government of a state could not be carried on in accordance with the provisions of the Constitution, he might declare that the powers of the Legislature of that state would be exercisable by or under the authority of Parliament. Article 357 provides to delegate the law-making power to the President. The effect of Article 356 would be that the Legislature of the state in question would stand dissolved or suspended and the law making power would vest in Parliament during the period the proclamation of Emergency remained in force. In addition to the Parliament's power to legislate directly on the State subjects under the foregoing Articles, the constitution also provides for the centre's consent before a bill passed by a state Legislature can become a law. The Indian Constitution directs the Governor of a state to reserve a bill passed by a state Legislature for the consideration of the President, if in his opinion, if it is passed into law, would derogate the power of the High Court so as to endanger the position which the court is required to fulfil under the Constitution[34]. The President shall have the power to give his assent to such a

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[31] Article 252 of the Constitution of India
[32] Article 253 of the Constitution of India
[33] Article 256 of the Constitution of India
[34] Article 200 of the Constitution of India

bill or return it to the state for reconsideration on the basis of his recommendations.[35]

Repugnancy between Centre Law and a State Law: Repugnancy means inconsistency between two laws. The expression repugnancy occurred in the Government of India Act, 1935. It is taken in our Constitution from the Act. When a law of the State Legislature is inconsistent with any law of the Parliament, the law of Parliament prevails over the law of the State. Article 254 provides that in case of inconsistency between laws made by Parliament and laws made by the Legislatures of States.(1) If any provision of a law made by the Legislature of a State is repugnant to any provision of a law made by Parliament which Parliament is competent to enact, or to any provision of an existing law with respect to one of the matters enumerated in the Concurrent List, then, subject to the provisions of clause (2), the law made by Parliament, whether passed before or after the law made by the Legislature of such State, or, as the case may be, the existing law, shall prevail and the law made by the Legislature of the State shall, to the extent of the repugnancy, be void. (2) Where a law made by the Legislature of a State with respect to one of the matters enumerated in the Concurrent List contains any provision repugnant to the provisions of an earlier law made by Parliament or an existing law with respect to that matter, then, the law so made by the Legislature of such State shall, if it has been reserved for the consideration of the President and has received his assent, prevail in that State. Provided that nothing in this clause shall prevent Parliament from enacting at any time any law with respect to the same matter including a law adding to, amending, varying or repealing the law so made by the Legislature of the State.In case of *Amalgamated Electricity Co. v. Ajmer Municipality*[36]The State law does not become void as soon as the Parliament legislates with respect to the same subject. There is nothing to prevent the State legislature to legislate with respect to a concurrent subject merely because there is a Union law relating to the same subject. Article 254 is attracted only if the State law is repugnant to the Union Act. Further in case of Zeverbhai *v. State of Bombay*[37] the Supreme Court held that the two cannot stand together.

Accession of new States or Reorganisation of States: Parliament by law can accede new States into the Indian Union. It can also make laws to this effect.[38]

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35 Article 201 of the Constitution of India
36 AIR 1969 SC 227.
37 AIR 1954 SC 752.
38 Article 2 to 4 of the Constitution of India

Conclusion

A federal Constitution establishes a dual polity with the Union at the Centre and the State at the periphery, each endowed with powers to be exercised in the field assigned to them. The Indian Constitution was framed and adopted in the background of partition of India. The Indian Constitution provides for a new kind of federalism to meet India's peculiar needs. The legislative authority is divided between the Centre and the States by the Constitution of India. In the matter of distribution of powers, if a matter happened to be included in the Union list and the State List, and if there was ever a conflict between them the Union List shall prevail. Similarly, if there was an overlapping between the Union and Concurrent lists, the Union list was paramount, and the Concurrent list had priority over the State List. On analysis of the three Lists it shows that the framers of our Constitution adopted a well-thought plan in preparing these Lists. The Parliament has power to make laws in the matters of National Importance, which contained in 97 entries in this Lists. In the State List matter included is of local importance, such as public order, police, administration of justice, prisons, public health, education, agriculture etc. However certain entries in State List are made subject to the entries in the Union Lists or the Concurrent List. The Parliament of India had a residuary powers of legislation. Though in normal times the distribution of powers must be strictly maintained and neither the State nor the Centre can encroach upon the sphere allotted to the other by the Constitution, yet in certain exceptional circumstances the above system of distribution is either suspended or the powers of the Union Parliament are expected over the subjects mentioned in the State List. In spite of a clear demarcation in the law-making power of Parliament and State Legislatures, Parliament was assigned a predominant position in the general Legislative field.

LAW AND POLICIES ON RIGHT TO HEALTH OF WOMEN IN INDIA: ISSUES AND CHALLENGES

Parvathi M.*

Introduction

Promoting health of women is one of the important obligations of the State. Protecting human right to health of Women and providing qualitative health care service is a paramount duty of the State. Nations with strong women's rights are more likely to have better health and faster growth than those who don't promote and protect these values. Women in India, have been facing series of health issues due to gender disparities in awareness, access and quality of care. They face heavy gender biases and are subsequently more likely to experience disadvantages in their lives, particularly when it comes to healthcare. Undernourishment, Malnutrition, lack of basic sanitization and treatment for diseases all contribute to the scarcity of healthcare resources available to women in India. Further, Because of the wide variation in cultures, religions, and levels of development among India's 28 states and 8 union territories, it is not surprising that women's health also varies greatly from state to state. They have been suffering with many serious health concerns, such as reproductive health, violence against women, nutritional status, unequal treatment of girls and boys, and HIV/AIDS.

Underprivileged socio economic conditions in India restrict a many women's access to adequate healthcare, ensuring in their children's poor health as well as the mother's abilities to lead full, productive lives at home, society or even in the economy. In many areas that to in rural, maternal mortality is still high due to poverty, backward practices, no qualitative health care service and the lack of facilities etc. Poor health has repercussions not only for women but also their families. Women in poor health are more likely to give birth to low weight infants. As a result, they also are less likely to be able to provide food and adequate care for their children. Finally, a woman's health affects the household economic well-being, as a woman in poor health will be less productive in the labour force.

In this background, an attempt has been made to discourse the important international conventions on health of women and measures taken by state to ensure women health care issues under the provisions of Indian Constitution. Further, various laws and policies have also been discussed to understand the level of implementation on right to women's health

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Historical Development of Health System in India

In India, health rights can be traced to the early civilization of Harappa and Mohenjo-Daro which when excavated revealed well planned cities with baths and drainage systems. Over the millennia several indigenous systems of medicines have evolved which emphasized the maintenance of health rather than mere treatment of disease.[1] The Indian health system is enduring many changes both in effective and theoretical terms. Fundamentally, India has a very mixed and intricate health system with a mixture of outdated and modern performs and belief systems. India has the dissimilarity of both formal and informal traditional systems being used widely, and the formal traditional systems are now amalgamated with in public policy architecture through a separate department of AYUSH (Ayurvedic, Unani, Siddha and Homoeopathy). There are separate medical colleges training health care provide in each of these different restraints. Today, many primary health centers crosswise rural India provide modern medicine and traditional medicines concomitantly, demonstrating a strong respect for local predilections, a key component of a right based approach. However, local health traditions are not limited to the formal counselors and include faith healers, herbal naturopaths, bone setters and others and these systems still remain outside the compass of policy discussions.

The broad frameworks of India public health system was drawn up a little prior to independence by the Bhore Committee (1946)[2]. The Primary Health Centre based configuration of the Bhore Committee report, with the aim of universal coverage and population-based parameters remains in place even now. However more than 70 years later it has not been able to meet health rights of its citizens. In the 1960' the health system became confused by the compulsion of population control and progressively the family planning family welfare component incredulous the health constituent of the programme, leading to the establishment of a new and better resourced department of family welfare. The family planning programm with its population control emphasis with targets and enticements introduced a period of human rights violations being committed by the health sector. These included among others intimidating decontaminations and gross abandon. Some aspects of those days continue through camps, target and incentive based sterilization programmes in some states even today.

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1 J. Healy & M Mckee (ed.), Accessing Health Care-Evolution of Health Services in India (New York: Oxford University Press, 2004), p-7

2 Health Survey and Development Committee was established in 1943 and was chaired by Sir Joseph Bhore.

In the 1990's and later it was comprehended that this fascination had neither yielded the predicted results, and the overall public funding available to health care had become very little. While the trend in most countries was that public disbursement, in India, it constituted only about 20 percent[3]. The private health care industry had started flourishing in the face of economic reforms starting from 1980's and 2000 it was found that health care cost had become the second largest root of rural improvement and a large number of families became poor because of one episode of hospitalization in the family. This pointed to a gross violations of the principles of economic availability, a core component of the right to health.

From the late 1990s onwards a series of deviations, often conflicting, were introduced in the health system both at the national and state levels. According to Constitutional provisions, health residues a state subject, while public health and family planning remain in the concurrent purview that is part of both central and state jurisdiction. In the changes consequent to 2000 the area of agreement has been that the state investment in vigor has to increase from an extremely low 0.9 percent of GDP in 2000. However what is equivocal has been route of providing services. Sometimes the privatization has been seen as the route, while at other times the public sector has been as most important. At one point public sector enhancement was seen through a user-fees model, but now free amenity at the point of delivery is being seen as the substitute. At this time the consensus appears to be that the public sector has to be the main different methods like public provisioning, contracting of provider's health insurance or other methods which include private sector engagement. The National Rural Health Mission (NRHM), the Rashtriya Swasthya Bima Yojana[4] (RSBY) a health insurance schemes for non-formal sector workers, various state level health insurance schemes for secondary and territory care like the Aarogyashri Scheme[5] and others remain key platforms and contrivances for delivering public services to the deprived.

The concept of Universal Health Coverage has been recently discussed and pondered through a specially constituted committee of the Planning

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[3] Information available from National Health Accounts, India 2001-2002, www.nhm.gov.in last visited 23rd Feb 2020

[4] A health insurance scheme for the poor from the Ministry of Labour and Employment which provides benefits upto Rs.30,000 for hospitalization. For additional details see www.rsby.gov.in

[5] A health insurance scheme for tertiary care for the for the poor run by the state government in Andhra Pradesh similar schemes are also run by Karnataka and Tamil Nadu.

Commission of India which contains financial, managerial and regulatory guidelines remains the sturdiest articulation of a right to health approach in the country. However, the report which was hypothetical to provide the basic construction of the health chapter of the 12th Five Year Plan remains largely snubbed in the 12th Plan document.

Meaning, Definition and Importance of the term 'Health' in India

Health is one of the most difficult terms to define. Health can mean different things to different people. A strict understanding that everyone has the guarantee of perfect health. Access to quality health care is not only a human need, a right of citizenship and a public good, but it is also pre-requisite to good health, which is essential to enjoy and achieve fruits of equitable development.[6] There have been many definitions of health focus upon the change in time and development. a) "The condition of certainty rigorous in body, mind or essence, especially liberty from corporeal disease or pain[7]." b) "accuracy of body or mind; that condition in which its functions are duly and capably discharged"[8] c) "A condition or quality of the human creature expressing the sufficient functioning of the organism in given conditions, genetic or environmental[9]." d) "A modus vivendi enabling deficient men to achieve a sensible and not too painful existence which they manage with an imperfect world[10]." e) "A state of relative quietness of body forms and function which results from its successful strong adjustment to forces tending to disturb it. It is not unexcitable interplay between body substance and forces invading it but an active response of body forces working toward restoration.[11]

The World Health Organization, 1948 has in its Constitution demarcated health as follows: "Health is a state of whole corporeal, rational and social welfare and not merely an absence of illness or infirmity." This statement is overgenerous to include the capability to lead a "socially and economically productive life[12]" The definition of health has been criticized as being too broad. Some contend that health cannot be defined as a "state" at all, but must be seen as a process of perpetual adjustment to the changing

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6 Available at http://findarticles.com>last visited on 23 Feb 2020
7 Webster Dictionary, www.webster-dictionary.org
8 Oxford English Dictionary, www.lexico.com
9 Operational definition of Health by WHO. www.similima.com
10 Dubos, R .Man, Medicine & Environment 1968, Published by Mentor Book, New york, 1st American Edition, Jan-1, 1968
11 Perkins definition on Health
12 WHO (1978) Health for all Sr. No.-1

demands of living and of the changing meanings we give to life. It is a vibrant concept. It helps people live healthy, work well and enjoy themselves. The WHO definition of health is therefore considered by many as an fervent goal than a precise proposition. It refers to a situation that may exist in some individuals but not in everyone all the time; it is not usually observed in groups of human beings and in communities[13]. Some contemplate it irrelevant to everyday demands, as nobody qualifies as healthy, i.e. perfect biological, psychosomatic and social operative.

International Convention on Right to Health of Women

By their nature, human rights are universal because they are derived from inherent dignity of each individual person.[14] Some people have questioned the universality of human rights, or of particular rights. International law, however, is unequivocal on the universality of human rights.[15] The Universal nature of these rights and freedom is beyond question.[16] A variety of human rights are implicated in a right based approach to health because realizing the right to health is dependent upon attaining other human rights, for example, the right to food, housing, work, access to information and freedom of movement among others.[17]The right to health is fundamental to the exercise of other human rights. The right to health can be construed as (A) a right to health care and (B) a right to conditions that promote good health. This is not a right to be healthy. Individual genetics, choices and susceptibility all affect health.[18]

(i) World Health Organization and Right to Health

The WHO Constitution was the first international instrument to enshrine the enjoyment of the highest attainable standard of health as a fundamental right of every human being (the right to health).[19] The Preamble

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13 WHO (1981) Techn. Rep. Sr.No-137

14 Audrey R. Chapman, Exploring a Human Rights Approach to Health Care Reform (Washington dc:American Association for the Advancement of Science,1993)p 22

15 See. Vienna Declaration, World Conference on Human Rights, Vienna, June 14-25, 1993, U. N. Doc. A/CNF.157/24 (Part I) at p 20, Para, 1, 1993.

16 Available at http://www1.umn.edu/humanrts/instree/l1viedec.html last visited on 18 Feb 2020

17 Committee on Economic, Social and Cultural Rights, General Comment 14, The right to the highest attainable standard of health U.N.Doc. E/C.12/2000/4 (2000) at para 3.

18 Judith Asher, "The Right to Health," A resource manual for NGOs 2004, p.17

19 In February 1946 the Economic and social Council of the United Nations established a technical preparatory Committee of Experts to prepare an agenda for

of the WHO Constitution is a masterfully coherent statement, claiming as its own the full area of contemporary international public health. In the same spirit as the Charter of the United Nations the Preamble asserts that the principles it states are basic to the happiness, harmonious relations and security of all peoples, thus expressing a modern set of universal aspiration. Health it says, is an essential condition for their attainment, and the highest possible attainment of health is a fundamental right of every human being without distinction of any kind. The Preamble defines health positively as complete physical, mental and social well-being, not merely negatively as the absence of disease or infirmity.[20]

(ii) The Universal Declaration of Human Rights and Health

The first catalogue of human rights and fundamental freedoms enumerated by the UN was UDHR, a declaration of United Nations General Assembly (UNGA) adopted in Paris, France, on 10th December 1948. The UDHR contains special provision relating to health under article 25.[21] Article 25 affirms that everyone has the right to a standard of living adequate for the health and well being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control Motherhood and childhood are entitled to special care and assistance. All children, whether born in or out of wedlock, shall enjoy the same social protection.[22] Since the adoption of the UDHR, the right to health has become widely accepted as a fundamental human right, explicitly recognized in various international and regional human rights treaties, as well as in national constitutions, domestic laws, policies and programmes.

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the International Health Conference in New York, to be held from 19 to 22 July 1946. The agenda included the preparation of Constitution for a WHO. The Conference eventually approved the WHO Constitution on 22 July, and designated an Interim Commission to carry out essential public health activities until the new organization was established. Representatives of sixty one states signed the WHO Constitution on July 22 1946, after which it remained open for signature until it came in to force on April 7, 1948.

20 Supra 17

21 Paul Sieghart, The International Law of Human Rights note 29, p 24

22 See Article 25 of Universal Declaration of Human Rights

(iii) The International Covenant on Economic, Social and Cultural Rights and Health

The UDHR's provision on the right to health is complemented by the provision in the International covenant on Economic, Social, and Cultural Rights (ICESCR) which is meant to elaborate on its meaning. This covenant was the first human rights treaty to require states to recognize and realize progressively the Right to Health, and it provides key provisions for the protection of Right to Health in International law.[23] Article 12 of the Covenant provides the most comprehensive article on the right to health in international human rights law. In accordance with article 12.1 of the Covenant to "the highest attainable standard of physical and mental health" is not confined to the right to health care. On the contrary, the drafting history and the express wording of article 12.2 acknowledge that the right to health embraces a wide range of socio-economic factors that promote conditions in which people can lead a healthy life, and extends to the underlying determinants of health, such as food and nutrition, housing, access to safe and adequate sanitation, safe and healthy working conditions, and a healthy environment.[24]

(iv) The African Charter and Right to Health

The African Charter[25] is the foundational normative instrument for the protection and promotion of human rights in Africa. It has been applauded as a document which departs from the norms in that it contains civil, political, economic, social and cultural rights. Article 16 of the African Charter on human and people's rights enshrines the right to the highest possible level of health. The Protocol to the African Charter on Human and people's Rights on the Rights of Women in Africa[26] which was adopted on 13 September 2000 specifically protects the right to health article 14 (health and reproductive rights). It also prohibits violence against women, including sexual violence, discrimination and harmful practices. Another African instrument which also enshrines the right to health is the African Charter on the Rights and Welfare of the Child, adopted under the auspices of the OAU which expressly defines the right to health in article 14 and lists specific measures that States parties must take to implement the right to health for African children. The Charter in addition protects other rights which may directly or indirectly impact a child's

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23 See Amnesty International Report 2007.

24 Committee on Economic,Social & Cultural Rights, General Comment 14, note 13.

25 African (Banjul) Charter on Human and Peoples Rights, adopted 27 June 1981, QAU Doc.CAB/LEG/67/3 rev.5,21 I.L.M.58 (1982), entered into fore Oct.21, 1986.

26 QAU Doc. CAB/LEG/66.6.

enjoyment of the right to health.[27] The African charter on the rights and welfare of the child also includes recognition of the right to health.[28]

(v) Alma-Ata Declaration

The Alma-Ata Declaration 0f 1978 emerged as a major milestone of the 20th century in the field of public health. In 1978, at a joint WHO-UNICEF conference in Alma-Ata, Kazakhstan, ministers of health from throughout the world agreed a major statement regarding the health policies deemed necessary to achieve the WHO goal of health for all by the year 2000.[29] This was important propounding a broad and consistent philosophy and strategy for the attainment of health for all.[30] The assembly called upon every competent United Nations body to co-ordinate with, and support, the efforts of the world health organization to achieve all governments, all health and development workers, and the world community to protect and promote the health of all the people of the world.

(vi) Doha Declaration on TRIPS and Public Health

In 2001, on 14th November WTO members adopted a special ministerial declaration at the WTO ministerial conference in Doha to clarify ambiguities between the need for governments to apply the principles of public health and the terms of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS). The Declaration responds to the concerns of developing countries about the obstacles they faced seeking to implement measures in the interest of health.

Constitutional Perspectives on Right to Health of Women in India

After establishment of Indian Constitution, the Right to Health is an issue of fundamental importance of the Indian society. The responsibility to protect, respect and fulfill the right to health lies not only with the medical

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[27] See. E.g. articles 3 (non-discrimination): 13 (handicapped children): 15 (child labour): 16 (Protection against child abuse and torture); 18 (protection of the family); 21 (protection against harmful social and cultural practices); 23 (refugee children); 27 (sexual exploitation); and 28 (drug abuse).

[28] Enrique Gonzalez; Right to Health, Module- 3 on circle of Rights, Amnesty International, India, p 272-286

[29] The Alma-Ata conference drew representatives from 134 countries, 67 international organizations, and many non-governmental organizations. (China was notably absent).

[30] Andrew Green, An Introduction to Health Planning in Developing Countries (Oxford: Oxford University Press,1993), p 43.

profession but also with public functionaries such as administrators and Judges[31].

(i) **Preamble and Health :** The preamble to the Constitution summits some of the core values and principles that monitor the Constitution of India. Although the preamble is not stared as a part of the Constitution and is not enforceable in a court of law, the Constitution is construed in the light of the preamble and in a bulk of decisions the Supreme Court of India has held that the objectives of justice, liberty, equality and fraternity stated in the preamble constitute the basic structure of the Constitution. The preamble directs the state to initiate measures to establish justice, equality, ensure dignity, etc. Which have a direct bearing on people's health.[32] The Constitution of India not only provides for the health care of the people but also directs the state to take essential measures to progress the condition of health of the people. Though the provisions enshrined under this part have no direct link with the healthcare, however from various judicial analyses it has been reputable that the purpose of the legislature were there to cover the health as a right of the citizens.

(ii) **Health and Fundamental Rights :** "No person shall be destitute of his life and personal liberty except according to procedure established by law". Though the phraseology of Article-21 starts with adverse word but the word "No" has been used in relation to the word deprived. The object of the fundamental right under Article 21 is to preclude encroachment upon personal liberty and deprivation of life except according to procedure established by law. It obviously means that this fundamental right has been provided against state only. If an act of private individual amounts to invasion upon the personal liberty or deprivation of life of other person, such violation would not fall under the strictures set for the Article 21.[33] In such a case the remedy for aggrieved person would be either under Article 226 of the Constitution or under general law. But, whether an act of private individual

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[31] Address by Justice K.G. Balakrishnan, Chief Justice of India, at" National Seminar on the Human Right to Health", (Organized by the Madhya Pradesh State Human Rights Commission at Bhopal), September 14, 2008, P-I

[32] N. B. Sarojini & others, Women's Right to Health (New Delhi: National Human Rights Commission, 2006), p.85

[33] V.N.Shukla, the Indian Constitutional Law

supported by the state annexes the personal liberty or life of another person, act will undoubtedly come under the realm of Article21[34].

(iii) **Right to Health as understood under Directive Principles of State Policies :** Part IV of the Indian Constitution deals with certain principles known as Directive Principles of State Policy. Although the Directive Principles are asserted to be fundamental in the governance of the country, they are not legally enforceable. They are guidelines for creating a social order characterized by social, economic and political justice, liberty, equality and fraternity as enunciated in the preamble.[35] These principles are fundamental in the governance of the country and the State is under the duty to apply these principles while exercising its law making power. Article-38 impose liability on state secure a social order for the promotion of welfare of the people but without public health we can't achieve it. Article-39(e) related with workers to protect their health. Article 41 imposed duty on state to public assistance basically for those who are sick and disable. Article-42 it's a primary responsibility of the state to protect the health of infant and mother by maternity benefit. Article-47 spell out the duty of the state to raise the level of nutrition and the standard of living of its people as primary responsibility.[36] Some other provisions relating to health fall in DPSP. The state shall in particular, direct its policy towards securing health of workers. State organized village panchayats and give such powers and authority for to function as units of self government.

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[34] Art- 21 will be accessible not only to every citizen of this country, but also to be a "person" who may no only to every citizen of this country. Hence even those who are not citizens of this country and come here simply as tourists or in any changed capacity will be permit to the protection of their lives in accordance with the Constitutional provisions. They also have a right to "Life" in this country. Part-III of the Constitution of India compacts with fundamental rights. The fundamental rights are not absolute; they are subject to reasonable restrictions. The prime function of the Supreme Court is to construe the law. The Constitution of India has not comprised right to health i.e. righto enjoy the highest attainable standard of physical and mental health under a explicit provision. But it is the Indian Judiciary who treat right to health an important part of right to life which is fundamental for all human beings under Art-21 of the Constitution.

[35] Article-21 of the Constitution of India "No person shall be deprived of his life and personal liberty except procedure established by law"

[36] *Javed v. State of Harayana,* AIR 2003 SC 3057

(iv) **Panchayat, Municipality and Health :** Not only the state but also panchayat, municipalities are liable to improve and protect public health. "The legislature of a state may endow the panchayats with necessary power and authority in relation to matters listed in the eleventh schedule."[37] The entries in this schedule having direct relevance to health are as fallows;

- Drinking
- Health and sanitation including hospitals, primary health centers & dispensaries
- Family Welfare
- Women and Child development
- Social welfare including welfare of the handicapped and mentally retarded
- Water supply for domestic industrial and commercial purpose
- Public health, sanitation conservancy and solid waste management
- Regulation of Slaughter-houses and tanneries.

(v) **Right to Health and Fundamental Duties:** Under Article-51(a) it is a Fundamental Duties of every citizen to protect and upgrade the present conditions of the environment in all spheres which will help in better health conditions of the human. The state is obliged to provide clean drinking water, health care facilities which include dispensaries, health care centers, hospitals and clinics, proper sanitation with cleanliness and hygienic environment, family welfare especially woman and child welfare, not excluding social welfare of the handicapped person.

Laws Pertaining to Right to Health of women in India

Human resources are central to all women health systems and a considerable share of resources allocated to women health goes towards them. Law has had important contributions to several women health achievements. The preservation of women health is among the most important goals of governments and law can serve as an effective tool not only at the individual level but also at a larger community level.[38]

The Medical Termination of Pregnancy Act 1971

This Act was enacted by the Indian Parliament in 1971. This Act extends to the whole of India except the state of Jammu and Kashmir.[39] This

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[37] Article 243G

[38] LO Gostin (ed) Public Health Law and Ethics: A Reader (California: University of California Press, 2002),

[39] The Medical Termination of Pregnancy Act, Article 1 (2)

act was passed to curb the population growth and protect the health of pregnant women. This act was provide for the termination of certain pregnancies by registered medical practitioners only. This act bars the application of Indian Penal Code for undertaking termination by registered medical practitioner. It categorically rules that notwithstanding anything contained in the Indian Penal Code, a registered medical practitioner shall not be guilty of any offence under that code or any other law for the time being in force, if any pregnancy is terminated by him in accordance with the provisions of this act.[40] The grounds for exercise of such powers enumerated under section 3. It lays down that pregnancy may be terminated if the length of the pregnancy does not exceed twenty weeks and not less than two registered medical practitioners are of the opinion, formed in good faith that continuance of pregnancy would involve a risk of life to the pregnant women or grave injury to her physical or mental health or leading to substantial risk that if the child was born, it would suffer from such physical or mental abnormalities as to be seriously handicapped.[41] The pregnancy of women who is minor or lunatic or both shall be terminated with the consent of her guardian and that too in writing.[42] To stop the frequent termination of the pregnancy by the force of this act it is laid down that no pregnancy shall be terminated at a place other than the hospital maintained by the government, or at a place which has been approved by the government for this purpose.[43]

The Maternity Benefit Act 1961

The Maternity Benefit Act 1961 is enacted to regulate the employment of women in certain establishments for certain periods before and after childbirth and to provide for maternity benefits and certain other benefits.[44] The object of maternity leave and benefit is to protect the dignity of motherhood by providing for the full and healthy maintenance of women and her child when she is not working.[45] For the purpose of protecting the health of the women no employer shall knowingly employ a woman in any establishment during the six weeks immediately following the day of delivery or her miscarriage.[46] Also no pregnant woman shall, on a request being made

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40 Section 3 (1)
41 Section 3 (2)
42 Section 3 (4)
43 Section 4
44 Preamble to Maternity Benefit Act 1961
45 Available at http;//www.medindia.net/indian_health_act/maternity-benefit-act-1961 introduction.htm>last visited 25th January 2020
46 Maternity Benefit Act 1961 Section 4(1)

by her in this behalf, be required by her employer to do during the period specified, any work which is of an arduous nature or which involves long hours of standing or which in any way is likely to interfere with her pregnancy or the normal development of the fetus, or is likely to cause her miscarriage or otherwise to adversely affect her health.[47]

Every woman shall be entitled to, and her employer shall be liable for, the payment of maternity benefit at the rate of the average daily wage for the period of her actual absence immediately preceding and including the day of her delivery and for the six weeks immediately following that day.[48] If any employer contravenes the provisions of this Act or the rules made thereunder he shall be punishable with imprisonment which may extend to three months, or with fine which may extend to five hundred rupees, or with both; and where the contravention is of any provision regarding maternity benefit or regarding payment of any other amount and such maternity benefit or amount has not already been recovered, the court shall in addition recover such maternity benefit or amount as it were a fine, and pay the same to the person entitled.[49]

The Pre Conception & Pre-natal Diagnostic Technique Act 1994 (amended in 2003)

The Prenatal Diagnostic Techniques Regulation and Prevention of Misuse Act 1994 was enacted to protect the female child in order to regulate the sex ratio in the country and to limit the tendency of the people to have a male child. This act provides for the regulation of the use of pre -natal diagnostic techniques for the purpose of detecting genetic or metabolic disorders or chromosomal abnormalities or certain congenital malformations or sex linked disorders and for the prevention of the misuse of such techniques for the purpose of pre-natal sex determination leading to female feticide, and for matters connected there with or incidental thereto.[50] No pre-natal diagnostic techniques shall be conducted except for the purpose of detection of any of the following abnormalities, viz, (i) Chromosomal abnormalities; (ii) Genetic metabolic diseases; (iii) Heamoglobinopathies; (iv)Sex-inked genetic diseases; (v) Congenital anomalies; (vi) Any other

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47 Section 4 (3)
48 *Ibid*.
49 *Ibid* Section 21
50 The Pre-natal Diagnostic Techniques Regulation and Prevention of Misuse Act, 1994

abnormalities or diseases as may be specified by the Central Supervisory Board.[51]

Policies and Programs with respect to Right to Health of Women in India

Integrating gender considerations in health needs to build on experiences with developing and implementing women's health policies and programmes in different parts of the world. After feminist movements across the globe in the 1070s demanded changes in legislation, policies, programmes and services affecting women's health. Women's health policies were grounded in a gender analysis of the causes of women's health problems, and sought to address these through programme strategies that were empowering to women.

(i) National Health Policy : One of the fundamental rights of every human being without distinction of race, religion, political belief, etc is the enjoyment of the highest attainable standard of health.[52] After independence, A National Heath Policy was adopted in 1983. The NHP of the Indian Government is a logical culmination of the consistent efforts, aimed at securing a healthy life for all Indians, pursued by the governments in the recent decades. While many of the achievements in the past, more needs to be done now and in near future.[53] The Main focus of the National Health Policy was the formulation of an integrated and comprehensive approach towards future development of health services, appropriately supported by medical education and research, with special emphasis on public health center and related support services.[54] With the enactment of the 73rd Constitutional Amendment Act 1992, panchayat raj institutions were revitalized, and a process of democratic decentralization ushered in, with similar provisions made for urban local bodies, municipalities and nagarpalikas. The importance of panchayat raj institutions also recognized in the tenth five year plan (2002-2007) to ensure local accountability of health care.[55] The Main objective of the national

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51 Section 4 (2)

52 Report of the health survey and planning Committee (mudaliar Committee)

53 National Health Policy note 24, p.1

54 Manoj Kumae Sinha, Enforcement of Economic, Social and Cultural Rights-International and National Persepectives, Manaka Publications Pvt. Ltd, New Delhi, 2006, p.262

55 Economic Survey, 2003-04, available at http://indiabudget.nic.in/es2003-04/esmain.htm last visited on 26 February 2020

policy 2002 is to achieve an acceptable standard of good health amongst the general population of the country.[56]

(ii) National Youth Policy : The National Youth Policy, 2003 reiterates the commitment of the entire nation to the composite and all-round development of the young sons and daughters of India and seeks to establish an All- India perspective to fulfill their legitimate aspirations so that they are all strong of heart and strong of body and mind in successfully accomplishing the challenging tasks of national reconstruction and social changes that lie ahead. The earlier National Youth Policy was formulated 1988. The socio-economic conditions in the country have since undergone a significant change and have been shaped by wide-ranging technological advancement. The National Youth Policy-2003 is designed to galvanize the youth to rise up to the new challenges, keeping in view the global scenario, and aims at motivating them to be active and committed participants in the exciting task of National Development.

National Youth Policy has been developed with thrust on youth empowerment and gender justice. Objectives of the Policy include increased access of young people to all information and services including reproductive health, promotion of social environment to prevent HIV/STD, drug abuse, etc. as well as provision of opportunities for education, skill development and employment of youth.[57]

The policy recognizes that a holistic approach health, mental, physical and spiritual, needs to be adopted after careful assessment of the health needs of the youth.

(iii) National Population Policy : Every civilized nation with a vision of planned development must have a national population policy. The economic and environmental consequences of excessive demographic growth are alarming and justify prophylactic and health perspectives designed to moderate and discipline the birth rate, so that the health of mother and child, the well-being of family and community, the promotion of sustainable development, lasting peace and social security

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[56] *Ibid*.

[57] Statement by Dalit Ezhilmalai, Union Minister of State for health and family welfare, Republic of India at The Hague Forum on Review of Progress in the Implementation of the ICPD Programme of Action,

without a struggle for survival, may be achieved.[58] In this regard, Government should intensify its efforts towards strengthening health promotion and disease prevention. In toting, increased budgetary allocation and better focused and targeted investments are needed in the areas of safe motherhood and child survival.

(iv) National Policy for the Aged : In India governments concern for the elderly began with India's participation in the World Assembly Conference in Vienna in 1982 where India adopted the United Nations international plan of action on ageing. This plan focused on the government's role in adopting programmes for the care and protection for the elderly, synchronizing these with the changing socio-economic conditions of the society. One of the early interventions was the introduction of pension schemes that were applicable to a minority of the elderly along with other welfare measures. The government has promised to set up an inter-ministerial committee to implement the National Policy on Older person which was released by the Government of India in January 1999, in the International Year of Older Persons.[59]

(v) National Mental Health Progamme : A National Mental Health Programme was launched in 1982, keeping in view the heavy burden of mental illness in the country and the inadequacy of the health system to meet the specific mental health needs. This programme aimed to shift the basis of practice from the traditional (psychiatric) services to community care. However, in reality, the National Mental program is only a footnote to the national health policy, and does not offer any (fiscal or technical) support for building community initiatives. In practice, the treatment of mental health problems is still heavily relying on the bio-medical model and is limited to the dispensing of drugs. Mental health care services are limited to those diagnosed with severe illness, where the patient is treated as a societal burden. The pattern of institutional care, especially for women, reeks of neglect and paternalism and requires gender sensitive cross referral system.[60]

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[58] V.R. Krishna Iyer, "Population Policy and legal prescriptions" The Hindu, August 13, 2008.

[59] Indrani Gupta, Purnamita Dasgupta, Maneeta Sawhney, "Health of the elderly in India-some Aspects of Vulnerability", p-21

[60] N.B.Sarojini and others, Women's Right to Health , National Human Rights Commission, New Delhi, 2006, p-27

The Government of India also launched the District Mental Health Programme in 1996-1997 under the recommendation of the Central Council of Health and Family Welfare. The Programme, initially launched in 4 states, was extended to 22 districts in 20 states by the year 2000 with a grant assistance of Rs. 22.5 lakhs each 28. The goal was to develop a community-based approach that has been neglected despite the programme commitment towards it. The other objectives were to impart public education in mental health to increase awareness and reduce stigma, early detection and treatment through both OPD and indoor services, and providing data from the community to the state and central levels for future planning of mental health programmes.[61]

(vi) National Rural Health Mission : Recognizing the importance of Health in the process of economic and social development and improving the quality of life of our citizens, the Government of India has resolved to launch the National Rural Health Mission to carry out necessary architectural correction in the basic health care delivery system. The mission adopts a synergistic approach by relating health to determinants of good health namely, segments of nutrition, sanitation, hygiene and safe drinking water. It also aims at mainstreaming the Indian system of medicine to facilitate health care. The plan of action includes increasing public expenditure on health, reducing regional imbalance in health infrastructure, pooling resources, integration of organizational structures optimization of health manpower, decentralization and district management of health programmes, community participation and ownership of assets, induction of management and financial personnel into district health system, operationalizing community health centers into functional hospitals meeting Indian Public Health Standards in each Block of the Country.[62] The Mission will enable the system to effectively handle increased allocation and promote policies that strengthen public health management and service delivery in the country. Wide ranging stakeholder consultations were held over a six-month period with state governments, the Planning Commission, the National Advisory Council, other government ministries/departments, health professionals

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[61] *Ibid*

[62] Government of India, National Rural Health Mission 2005-2012 Report

and non-governmental organizations(NGOs) to draw up the Mission strategy.[63]

(vii) National Nutrition Policy : India's concern for nutrition has been as old as her civilization. Its holy books and other ancient scriptures contain guiding principles for nutrition and health. In the post independent India there has been an unequivocal commitment to the cause of nutrition through Constitutional provisions. The Constitution of India states explicitly in Article 47 that the "State shall regard the raising of the level of the nutrition and the standard of living of its people and the improvement of public health among its primary duties. Widespread poverty resulting in chronic and persistent hunger is the single biggest scourge of the developing world today. The physical expression of this continuously re-enacted tragedy is the condition of nutrition which manifests itself among large sections of the poor. Particularly amongst the women and children. Under nutrition is a condition resulting from inadequate intake of food or more essential nutrient(s) resulting in deterioration of physical growth and health.[64]

Judicial verdicts on Right to Health of Women in India

Any form of discrimination, be it gender or practice of untouchability, has sever implications for health, preventing or limiting access to basic needs and opportunities that impact health and access to health care. For example, women are traditionally responsible for fetching water. Depending on the distance of the source of water, the location, the woman's age, caste, health status and various other conditions at home impact her access to water, which in turn affects her health and the health of others in her family. Right to Protection of Life and Personal Liberty (Article 21) ensures that no person shall be deprived of his/her life or personal liberty, except according to the procedure established by law. While the provision of health services is essential to ensure good health[65] pregnancy, childbirth and the postpartum period are one of the riskiest stages of a woman's life. Every year over 1,30,000 Indian women lose their lives in pregnancy and childbirth. However, this right has not been explicitly guaranteed, though the Indian Constitution

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[63] S.K.Satpathy and S. Venkatesh, "Human Resources for health in India's National Rural Health Mission: Dimension and Challenges" egional Health Forum, Vol-10, No. 1, p-30

[64] Government of India, National Nutrition Policy-1983

[65] N.B.Sarojini & others,Women's Right to Health (New Delhi: National Human Rights Commission, 2006), p- 85

does make reference to maternity related benefits for the women.[66] Several Human Rights mechanisms, throughout the sphere, have predictable 'right to health' as a basic human right. In India, through 'right to health' is not recognized as a fundamental right explicitly, the judiciary by its explicated role has recognized it as a fundamental right under Article-21 of the Constitution as an accumulation to the 'right to life'. The responsibility to respect, protect and fulfill the 'right to health' deceits not only with the medical profession but also with the public functionaries such as administrators and judges. The Supreme Court has given appreciation to right to health vide different techniques of interpretation. "The government is under Constitutional compulsion to provide health facilities". Right to health is also one of the rights, which is disguised under right to life and personal liberty as assured by the Constitution of India.

The Constitution integrates provisions ensuring everyone's right to the utmost manageable standard of physical and mental health. Article-21 of the Constitution guarantees protection of life and individual liberty to every citizen. The Supreme Court in *Bandhu Mukti Morcha* v. *Union of India*[67], has held that the right to live with human dignity esteemed in Arti-21 is derived from the directive principles of state policy and therefore contains protection to health. In *Vincent Panikulangara* v. *Union of India*[68], the Supreme Court of India on the right to health care observed "maintenance and enhancement of public health have to rank high as these are indispensable to the very physical survival of the community and on the betterment of these depends the building of the society of which the Constitution makers visualized. Attending to public health in our opinion, therefore is of high priority perhaps the one at the top".

In a historic verdict in *Consumer Education and Resource Center* v. *Union of India*[69], the Supreme Court has apprehended that the right to health and medical care is a fundamental right to health under Article-21 of the Constitution as it is vital for making the life of the workman meaningful and purposeful with dignity of person. "Right to life in Article-21 does not cannot mere animal survival. It has a much broader meaning which contains right to livelihood, better standard of life, hygienic conditions on workplace and leisure. The court held that the State, be it Union or State Government or an

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66 Vijay Hiremat and Kmayani Bali Mahabal, "Health Care Case Law in India",
67 AIR 1984 SC 802
68 AIR 1987 SC 990-995, P.995
69 AIR (1995) 3 SCC, 42.

industry, public or private is enjoined to take all such action which will promote health, strength and vigor of the workman during period of employment and leisure and health even after retirement as basic prerequisites to life with health and happiness. The right to life with human dignity embraces within its fold, some of the finer facets of human augmentation which makes life worth living. The court accordingly laid down the fallowing guidelines to be followed by all actual industries.

In *Kirloskar Brothers Ltd* v. *Employees State Insurance Corporation*[70]. The Supreme Court, succeeding the Consumer Education and research Center's case, has held that right to health is a fundamental right of the workmen. The Court also held that this right is not only accessible against the state and its instrumentalities but even private industries to ensure to the workmen to provide facilities and opportunities for health and strength of the Constitution which are important part of right to equality under Art-14 and right to renovated life under art-21 which are fundamental rights to the workmen.

Further in, *State of Punjab and Others* v. *Mohinder Singh Chawala*[71], "It has been held that right to health is vigorous to right to life. Government has a Constitutional compulsion to afford health facilities." Similarly, the court has upheld the state's obligation to maintain health services. Apart from distinguishing the fundamental right to health as an essential part of the right to Life, there is appropriate case law lays down the obligation of the State to provide medical health services. The issue of adequacy of medical health services was also instructed in *Paschim Banga Khet Mazdoor Samity* v. *State of West Bengal*[72] The question before the court was whether the non-availability of services in the government health centers amount to a violation of Art-21? It was held that Art-21 imposes an obligation on the State to safeguard the right to life of every person. Protection of human life is thus of paramount importance. The government hospitals run by the State and the medical officers employed therein re duty-bound to extend medical assistance for stabilizing human life.

Failure on the part of a government hospital to provide timely medical treatment to a person in need of such treatment results in violation of his right to life guaranteed under Article-21. Therefore, the adversity of a government

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70 AIR (1995) 2 SCC 682
71 AIR (1997) 2 SC 83
72 Agarwal SC (J), Nanawati GT (J) AIR 1996 SC

run health center to provide timely treatment is violate of person's right to life. Further, the Court ordered that primary health care centers be furnished to deal with medical emergencies. It has also been held in this judgment that the lack of financial assets cannot be a reason for the State to say away from its constitutional obligation.

In *Mahendra Pratap Singh* v. *State of Orissa*[73]. In a Case pertaining to the failure of the government in opening a primary health care center in a village, the court had held "In a country like ours, it may not be possible to stagger sophisticated hospitals but definitely villagers within their limitations can desire to have a Primary Health Center. The government is prerequisite to assist people get treatment and lead a healthy life. Healthy society is a communal gain and no Government should make any effort to conceal it. Primary concern should be the primary health center and technical fetters cannot be introduced as deceptions to cause restraints in the establishment of health center. It was also stated that, great achievements and accomplishments in life are possible if one is permitted to lead an adequately healthy life. Thereby, there is in repercussion that the enforcing of the right to life is a duty of the state and that this duty covers the providing of right to primary health care. This would then indicate that the right to life holds the right to primary health care.

In *Shree Shakti Sanghathana* v. *Union of India*[74] women's activist battled in the court and took to the streets protesting the introduction into the population control programme of Net-en, manufactured by Schering AG, Germany marketed by German remedies and Depo Provera manufactured by upjhon company, USA and marketed by Max Pharma, India. Their argument was based on Article 21, or the right of a woman to a life with dignity: Net-en trials are being conducted without the informed consent of participants. They violated the ICMR's own stated criteria of ethics and also transgressed the Helsinki Declaration on Human Experiment to which India is a signatory. After 14 years of a prolonged legal confrontation, the activists wrested from the government an undertaking that Depo-Provera would not be allowed for 'mass use' in the family planning programme and that Net-En would be introduced "only where adequate facilities for follow up and counseling are available".

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73 AIR 1997 Ori 37

74 WP © No. 680 of 9196 decided on August 24, 2000

In *Ramakant Rai and Health Watch Up and Bihar* v. *Union of India*[75] petitioners contended that the respondents have totally failed and neglected to implement the Ministry of Health and Welfare's Guidelines on Standard of Female Sterilization (the Sterilization Guidelines) which were enacted in October 1999. The petition invoked international source of law, emphasizing "India ratifies many conventions that promote reproductive rights" with special focus on women, health services and discrimination against women. Highlighting the salient features of the Alma-Ata Declaration, CEDAW, the ICPD Programme of Action, and the Platform for Action, the petition framed its arguments based on the rights framework established through these international documents. The petition relied upon domestic law, too arguing that the respondents have "failed to realize" the constitutional right to health, which is a part of the right to life enshrined in Articles 14, 15, 21 and 47 of the Constitution of India. In addition the petition cited domestic case law in which the Supreme Court established the right to health, held the government vicariously liable for medical negligence, and recognized a right to compensation stemming from governmental negligence. The Supreme Court directed the central government to establish uniform standard on various issues including norms for compensation, formatting of statistics, uniform checklists, consent forms, and an insurance policy within four weeks. In the interim, the Court instructed all states to follow the compensation norms of the State of Andhra Pradesh. In response to the PIL, the central government has issued a National Family Planning Insurance Scheme to award monetary compensation to women and their families in cases of complications, pregnancy, or death after sterilization procedures in either government or accredited private health facilities.

Conclusion

Right to health falls within the realm of the right to life and personal liberty. It is the liability of the state to provide health care facilities and services to all its people specially women without any discrimination. The Judiciary has played an important role in safeguarding the right to health of women. The term right to health has not been expressly mentioned in the Indian Constitution, nevertheless, the Supreme Court has interpreted it as a fundamental right under Right to Life. It is a generous view of the Supreme Court that first it construed Right to Health under Part IV that is Directive Principles of State Policy and noted that it is the duty of the State to look after the health of the people at enormous particularly women health care issues. In

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[75] WP © No. 209 of 2003

the real sense, the Court has played a significant role in imposing positive obligations on authorities to protect the health of women in India.

Further, there have been a series of legislations and policies including Apex court decisions to provide essential health care services for women and children. But, due to lack of effective implementation and lack of awareness about these laws, policies, judicial verdicts on women health issues, they are still remained in white papers. In this regard, it is not only the duty of appropriate governments to prepare so many plans, programmes and policies on health of women, but also to provide qualitative health care services to women and make proper and effective measures to implement them in true spirit. Further, Women should be educated about the importance of health and make use of the health care facilities with the help of local self-governments. Authorities constituted under different legislations have to carry out their duties and functions effectively and efficiently to promote women qualitative health care services particularly in rural and semi urban areas.

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